Supreme Court, U.S.
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No._____

In The

Supreme Court of The United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MALISSA ANN CRAWLEY,

Petitioner,

v.

MICHAEL MOORE, AS DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendment's requirement of due process notice and its prohibition against vague criminal statutes?

PARTIES BELOW

The parties before this Court are petitioners Cornelia Whitner and Malissa Ann Crawley, and respondents State of South Carolina and Michael Moore, as Director of the South Carolina Department of Corrections.

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PETITION FOR WRIT OF CERTIORARI

Cornelia Whitner and Malissa Ann Crawley respectfully submit this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of South Carolina in *Whitner v. State*, filed on October 27, 1997, and the subsequent decision in *Crawley v. Evatt*, relying on the *Whitner* opinion.[1]

OPINION BELOW

The Supreme Court of South Carolina, on writ of certiorari, reversed the order of the Court of Common Pleas granting Ms. Whitner's Application for Post Conviction Relief. The *Whitner* decision is reported at 328 S.C. 1, 492 S.E.2d 777, and is reprinted in the Appendix hereto at 3a-27a.[2] The South Carolina Supreme Court's denial of Ms. Whitner's Petition for Rehearing (70a), and her Application to Remain on Bond are unreported (93a-95a), as is the order of the Court of Common Pleas. (64a-69a) In the wake of the *Whitner* decision, on December 1, 1997, the South Carolina Supreme Court granted the state's petition for a writ of certiorari in Ms. Crawley's case, reversed the grant of state habeas relief, denied her Petition for Rehearing, and denied her subsequent Application to Remain on Bond. (96a-97a)

STATEMENT OF JURISDICTION

The opinion of the South Carolina Supreme Court from which petitioner Whitner seeks review was issued on October

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[1] Pursuant to Rule 12.2 of the Rules of the Supreme Court of the United States, petitioners file a single petition for a writ of certiorari because the two judgments raise identical questions.

[2] For the convenience of the Court, all unpublished material is included in petitioners' Lodging and cited herein as ("L. __")

27, 1997, and became final on November 19, 1997. The opinion from which petitioner Crawley seeks review was issued on December 1, 1997, and became final on January 8, 1998. This Court granted a thirty-day extension enlarging the time in which to file the petition to March 19, 1998. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment, Section 1 to the United States Constitution, and South Carolina Code Ann. § 20-7-50 ("§ 20-7-50") is set forth in the Appendix at 98a-99a. Section 20-7-50 provides:

> Any person having legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.[3]

STATEMENT OF THE CASE

In 1989, two South Carolina solicitors began applying the state's child endangerment law, § 20-7-50 (98a), to pregnant

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[3] Section 20-7-50 was amended in 1993 to make a violation of the statute a felony, and to increase the maximum term of imprisonment to conform to the new classification. *See* S.C. Code Ann. § 20-7-50 (Supp. 1994). The Supreme Court of South Carolina cited the earlier version of the statute in *Whitner v. State* because Ms. Whitner was prosecuted under that version. *See Whitner v. State*, 492 S.E.2d at 778 n.1. (5a) Section 20-7-50 was amended again in 1996. S.C. Code Ann. § 20-7-50 (1997). (99a)

women whose conduct was presumed to pose a risk to fetal health. Since that time, the overwhelming majority of women arrested pursuant to this new interpretation, including petitioners Cornelia Whitner and Malissa Crawley, have been low-income, African-American women who sought health care, and who, instead of being offered treatment for their substance dependency during pregnancy, were arrested after the hospital reported their condition to the local police department.[4]

A. Cornelia Whitner

On April 7, 1992, Cornelia Whitner, a 28 year old, African-American woman, was indicted for violating § 20-7-50 by allegedly failing "to provide proper medical care for her unborn child by using crack cocaine while pregnant." Affidavit in Support of the Arrest Warrant D-038088 (Feb. 5, 1992).

At her plea hearing on April 20, 1992, Ms. Whitner's attorney stated that Ms. Whitner's son, Tevin, born February

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[4] In Charleston, for example, only pregnant women who sought treatment at the Medical University of South Carolina ("MUSC"), and were determined to have a history of cocaine use were arrested pursuant to the new interpretation of the statute. Of the women arrested under this policy, 96% are African-American. *See Ferguson, et al. v. Charleston, et al.*, CA#2:93-2624-12, Judgment (D.S.C. 1997) (L. 207-18), *appeal filed,* No. 97-2512 (4th Cir.); *see also* Philip H. Jos, *et al.*, *The Charleston Policy on Cocaine Use During Pregnancy*: A Cautionary Tale, 23 J. Law, Med. Ethics, 120, 124 (1995); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Rights of Privacy*, 104 Harv. L. Rev. 1419, 1421 n.6 (1991); *Settlement Agreement Between Medical Center of the Medical University of South Carolina and Office for Civil Rights*, U.S. Department of Health and Human Services (Aug. 8, 1994). (L. 219-24)

2, 1992, enjoyed good health, and that Ms. Whitner had received substance abuse counseling. Ms. Whitner, requesting assistance from the court, said: "I need some help, your honor." *State v. Whitner*, 92-GS-39-670, Transcript of Record at 2 (S.C. Ct. Gen. Sess. Pickens Cty Apr. 20, 1992). (51a)

Although Ms. Whitner and her attorney emphasized both the need and Ms. Whitner's desire for in-patient treatment, *id.* (55a), the court responded, "I think I'll just let her go to jail." *Id.* Ms. Whitner was then sentenced to eight years in prison. *Id.*

On May 13, 1993, after serving more than a year of her eight year sentence, Ms. Whitner filed an Application for Post-Conviction Relief ("PCR") in the Court of Common Pleas ("PCR Court"), raising both state and federal constitutional grounds for seeking relief. (57a-63a) On November 22, 1993, the PCR Court issued an order granting Ms. Whitner's application, and vacating her sentence. *Whitner v. State*, 93, CP-39-347, slip op. (S.C. Ct. C.P. Nov. 22, 1993). (64a-69a) In doing so, the PCR Court concluded that the lower court lacked subject matter jurisdiction to accept a guilty plea based on a non-existent offense. Specifically, the PCR Court found that the "plain, ordinary, and popular meaning of `a person under the age of eighteen' does not include a fetus." PCR Court Order at 3. (66a)

On July 15, 1996, the South Carolina Supreme Court, on writ of certiorari, and addressing only the state law issues, reversed the PCR Court's decision. *See* slip op. No. 24468 (S.C. Sup. Ct. July 15, 1996). (28a-49a) Thereafter, on October 27, 1997, the state high court granted Ms. Whitner's Petition for Rehearing, issued a refiled opinion addressing both state and federal claims, and reversed the PCR Court's order. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). (3a-27a) Ms. Whitner, who reported to the Leath Correctional Facility in December 1997, has now served almost two years of her eight year sentence.

B. Malissa Ann Crawley

On January 6, 1992, petitioner Malissa Ann Crawley, a 31 year old African-American woman, was indicted on a charge of child neglect based on her pregnancy and substance dependency. On the advice of her court-appointed attorney, Ms. Crawley pled guilty before the Court of General Sessions. *State v. Crawley*, 92-GS-04-01 slip op. (S.C. Ct. Gen. Sess. Jan 6, 1992). (74a-83a) The court sentenced Ms. Crawley to five years in prison, which was suspended to five years probation.

On July 15, 1994, Ms. Crawley was assaulted by her boyfriend. Although she was the victim of abuse, she was charged with Criminal Domestic Violence. Ms. Crawley, not advised of any defenses, including that of self-defense, and not understanding the ramifications of a guilty plea, pled guilty to the charge, which carried a maximum punishment of 30 days or a fine of $500. As a result, on August 5, 1994, she was found to have violated her probation, and was ordered to begin serving her previously suspended five year sentence.

A petition for a writ of habeas corpus was filed on September 25, 1994, alleging that the act to which Ms. Crawley pled guilty under § 20-7-50 is not a crime in South Carolina. (84a-85a) The court granted the requested relief, holding that "all other circuit court[s] that have addressed the issue have resolved the issue in favor of the petitioner." *Crawley v. Evatt*, 94-CP-04-1280, slip op. at 2 (Ct. C. P., Anderson Cty, S.C. Oct. 17, 1994) (87a)

Soon after her release, Ms. Crawley successfully completed a substance addiction treatment program. Since that time, Ms. Crawley has cared for her children, all of whom are healthy, has received health care training, and been employed as a home health care assistant. *See* Ms. Crawley's Application to Remain on Bond to the Supreme Court of South Carolina. (93a) However, on December 1, 1997, the South Carolina Supreme Court, ruling on the State's appeal,

reversed the grant of habeas relief, and reinstated Ms. Crawley's conviction. *Crawley v. Evatt*, Mem. Op. No. 97-MO-117 (S.C. Dec. 1, 1997). (89a-90a) The court denied her petition for rehearing on January 8, 1998. (91a-92a) Despite the positive changes in Ms. Crawley's life, the court also denied her petition to remain on bond.

On February 25, 1998, Ms. Crawley filed an application to stay the mandate of the South Carolina Supreme Court pending this Court's consideration of the petition for certiorari. The application was denied on February 27, 1998. Ms. Crawley returned to prison on March 2, 1998, compelling her to leave her young children, ages 6, 4, and 2.

C. Opinion Below

In *Whitner*, the South Carolina Supreme Court examined the scope of the state's child neglect statute, § 20-7-50, and noted that:

> Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. Sec. 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

Whitner, 492 S.E.2d at 779. (7a) A three member majority of the court, in concluding that "the word `child'... includes viable fetuses," *id.* at 778 (5a), accepted the State's argument that §20-7-50 "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus." *Id.* at 779. (7a)

In reaching this conclusion, the court relied on two prior rulings in civil wrongful death cases, *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), and *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), as well as a decision in one criminal case, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), in which the court created, and applied prospectively, a new common law crime of "feticide." The *Whitner* court

reasoned: "[I]t would be absurd to recognize the viable fetus as a person for purpose of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse." *Id.* at 780. (9a)

The court below explicitly rejected petitioner Whitner's argument that the South Carolina Legislature could not have intended such an interpretation, because it would lead to the "absurd" result of making all activities by pregnant women potentially harmful to a fetus, unlawful neglect. The majority in *Whitner* held that it "need not address this potential parade of horribles." *Id.* (12a) Nevertheless, it specifically found that applying § 20-7-50 to other conduct by pregnant women, such as smoking cigarettes and drinking alcohol, would also be consistent with the legislative intent. *Id.* at 782. (12a)

On rehearing, the majority also rejected Ms. Whitner's federal constitutional due process notice and vagueness claims, concluding that she had adequate notice because (i) of the plain meaning of the word "child," and (ii) "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child." *Id.* at 785. (19a)

In his dissent, Chief Justice Finney concluded that "[a] plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children and not those which may harm fetuses." *Id.* at 787. (Finney, C.J. dissenting). (23a-24a) He noted further that a prior South Carolina decision, *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995), interpreting a civil section of the Children's Code, established that the term "child" means "a child in being and not a fetus." *Id.* at 786. (23a) According to Chief Justice Finney, "[i]t would be incongruous at best to hold that the definition of `child' in the civil context of *Doe* is more restrictive than it is in the criminal context..." *Id.* Chief Justice Finney concluded his analysis by noting that "[t]he statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the

concept of legal custody is simply inapplicable to a fetus." *Id.* (24a)

Likewise, Justice Moore, concurring in the dissent, concluded that the majority had "invade[d] what is clearly the sole province of the legislative branch," and "embark[ed] on a course of judicial activism rejected by every other court to address the issue." *Id.* at 787. (25a) He concluded further that the majority opinion rendered the statute unconstitutionally vague because "a pregnant woman potentially [will now be] criminally liable for myriad acts which the legislature has not seen fit to criminalize." *Id.* at 788. (26a)

REASONS FOR GRANTING THE WRIT

The *Whitner* court has created an intolerable conflict among the nation's state high courts regarding the scope of the federal constitutional guarantees embodied in the Fourteenth Amendment. The high courts of Kentucky and Nevada have squarely held that the due process guarantee of notice and its prohibition against vague criminal statutes preclude the use of child neglect statutes to punish women for their conduct during pregnancy. *See Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596, 598 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). These courts, as well as all other state courts, have construed these federal constitutional protections in a manner that now directly conflicts with the *Whitner* court's constitutional analysis. This Court must issue accept the petition in order to resolve this conflict, and thereby ensure a consistent, nation-wide interpretation of federal due process guarantees.

Moreover, beyond the conflict among state courts, the *Whitner* decision demonstrates that the court below has fundamentally misconstrued the constitutional principles of due process, and in so doing, has advanced an analysis that completely confounds this Court's Fourteenth Amendment jurisprudence.

Petitioners did not have notice that South Carolina's child endangerment statute would be reinterpreted to apply to their conduct during pregnancy, and neither the statutory language, its prior interpretation, nor the legislative history would have so informed them. In fact, the South Carolina Legislature (the "Legislature"), like every other state legislature that has considered expanding its child neglect statute to reach pregnant women or creating special penalties for women who become pregnant while substance addicted, deliberately chose not to do so.[5] *See Whitner*, 492 S.E.2d at 787 (Moore, A.J.

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[5] *See, e.g.*, Allison Marshall, 1994 Legislative Update, in

dissenting). (25a) Instead, the Legislature rejected these proposals, and in so doing, acknowledged the conclusion of every leading medical group, that threatening women with arrest for conduct engaged in during pregnancy will endanger both fetal and maternal health by frightening women away from prenatal and other needed care.[6]

Furthermore, § 20-7-50, as reinterpreted, is so vague that it fails to provide pregnant women and their physicians with notice as to which of the infinite number of actions taken by pregnant women will be deemed criminal and/or must be reported. In addition, because pregnant women cannot know when viability will be deemed to have occurred, they are uncertain not only as to which actions are proscribed, but also when those actions will subject them to punishment. Given the arbitrary and discriminatory enforcement extant prior to the *Whitner* decision, the decision now, by virtue of its expansion of the activities that may render one subject to prosection, will only serve to exacerbate an intolerable situation.

National Association for Families and Addiction Research and Education Update (Spring 1995).

[6] *See Johnson v. State*, 602 So. 2d 1288, 1295-96 (Fla. 1992) (holding that a state statute prohibiting the delivery of any controlled substance to a "person under the age of 18 years" did not apply to a pregnant woman who was charged with "delivering" cocaine through the umbilical cord, and finding that "[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected"); *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, 35 (1992), (viewing addiction during pregnancy as a disease and noting that treatment rather than prosecution is the approach "overwhelmingly in accord with the opinions of local and national medical experts"), *cert. denied*, (1992 Ga. LEXIS 467 (June 4, 1992)).

Finally, the *Whitner* decision has implications far beyond the fate of the two petitioners in this case.[7] It will hurt those women who, because of fear of arrest, may not seek the prenatal care that could significantly improve maternal and fetal health, women whose medical decisions may now be construed as endangering fetal health, and physicians and other health care professionals who are now at risk of arrest for failure to report child neglect.[8] *See* S.C. Code Ann. § 20-7-510(A).

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[7] It will affect women whose convictions either have been or are likely to be upheld based on the *Whitner* decision as well as those who are now subject to its vague proscriptions. *See, e.g., Collins v. State*, Mem. Op. No. 97-MO-115 (S.C. Dec. 1, 1997) (granting state's petition for writ of certiorari, reversing the grant of post-conviction relief, and reinstating the conviction for unlawful child neglect based on Ms. Collins' substance dependency during pregnancy), *reh'g denied,* (Jan. 8, 1998) (L. 150-52); *Rickman v. Evatt*, Mem. Op. No. 97-MO-116 (Dec. 1, 1998), *reh'g denied,* (Jan. 8, 1998) (L. 163-66); *Sullivan v. State*, No. 93-CP-23-3223, Order (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994), *petiton for cert. filed*, Dec. 23, 1997. (L. 153-57); *State v. Garrick*, Case No. 95-GS-40-08467 (Ct. Gen. Sess. Richland Cty, S.C. Dec. 2, 1997). (L. 206)

[8] Pursuant to § 20-7-560, "[a] person required to report a case of child abuse or neglect [and] who knowingly fails to do so ... is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than six months, or both."

ARGUMENT

I. BY REINTERPRETING THE WORD "CHILD," THE *WHITNER* COURT HAS ENGENDERED A CONFLICT AMONG THE NATION'S STATE HIGH COURTS REGARDING THE SCOPE OF FEDERAL DUE PROCESS GUARANTEES

From 1977 to the present, *see Reyes v. Superior Court of San Bernadino Cty*, 75 Cal. App.3d 214, 141 Cal. Rptr. 912 (4th Dist. 1977), prosecutors in more than thirty states have attempted to use existing criminal laws to punish women for their behavior during pregnancy that could be harmful to fetuses,[9] and, with the sole exception of the South Carolina Supreme Court, every state court of last resort, as well as all intermediate appellate courts[10] and numerous trial courts[11]

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[9] While many of those charged under such laws were addicted to illegal substances during pregnancy, others were charged for engaging in other conduct, such as drinking alcohol. *See, e.g., State v. Zimmerman*, No. 96-CF-525, slip op. (Cir. Ct. Racine Cty, Wis. Sept. 18, 1996), *appeal filed,* No. 96-2797-C.R. (Wis. Ct. App. Dist. II). (L. 188-205)

[10] *See, e.g., Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (in dismissing child abuse charges filed against a woman for heroin use during pregnancy, court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. El Paso 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), *review denied*, 130 Wash. 2d 1018, 928 P.2d 413 (1996); *State*

reaching this issue, has rejected the use of child endangerment and other criminal statutes to punish women for their conduct during pregnancy.

The South Carolina Supreme Court's decision to expand the scope of § 20-7-50 directly conflicts with the decisions of its sister state courts. The high courts of Nevada and Kentucky expressly ruled that the use of child endangerment statutes to prosecute women for prenatal conduct violates the federal constitutional guarantee of due process. Specifically, in *Encoe*, 885 P.2d 596, and *Welch*, 864 S.W.2d 280, the supreme courts of Nevada and Kentucky each determined that their criminal child neglect statutes could not be applied to a pregnant woman's conduct because to do so would: (1) violate the plain meaning of their respective statutes; (2) deprive a woman of constitutionally mandated due process notice; and (3) render the statutes unconstitutionally vague.

As the Kentucky Supreme Court in *Welch* explained with regard to KRS §§ 508.100, 508.110, and 508.120:

> The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the danger of the road? The defense asks where do we draw the line

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v. Gethers, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug use on ground that such application misconstrues the purpose of the law).

[11] *See* unpublished trial court decisions (L. 1-187).

> self-abuse by a pregnant woman that wantonly exposes to risk her unborn baby? The Commonwealth replies that the General Assembly probably intended to draw the line at conduct that qualifies as criminal, and then leave it to the prosecutor to decide when such conduct should be prosecuted as child abuse in addition to the crime actually committed.
>
> However, it is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct *per se*. The Commonwealth's approach would exclude alcohol abuse, however devastating to the baby in the womb, unless the Commonwealth could prove an act of drunk driving; but it is the mother's alcoholism, not the act of driving that causes the fetal alcohol syndrome. The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; *they lack fair notice and violate constitutional due process limits against statutory vagueness*.

864 S.W.2d at 283 (emphasis added).

Similarly, in *Encoe*, the Nevada supreme court held that its child neglect statute, NRS § 200.508, did not apply to a mother's prenatal substance dependency. The *Encoe* court "recognized that due process prohibits courts from interpreting existing laws in an unforeseeable or unintended manner," and stated that such an interpretation would render the statute unconstitutionally vague. 885 P.2d at 596 ("To hold otherwise would ... open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins.").

A controlling opinion from the Michigan Court of Appeals,[12] *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d

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[12] *See Wieczorek v. Volkswagenwerk*, 731 F.2d 309, 310 (6th Cir. 1984).

50 (1991), *leave to appeal denied*, 437 Mich. 1046 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991), held that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violated the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties." 188 Mich. App. at 309, 469 N.W.2d at 52. Likewise, a controlling Georgia Court of Appeals decision,[13] *State v. Luster*, 419 S.E.2d at 33, strictly construed a state statute proscribing drug delivery "from one person to another" because to do otherwise would deprive pregnant women of fair notice.

In addition, the supreme courts of Ohio and Florida construed their respective statutes in conformity with the federal due process requirement that penal statutes provide fair notice of the conduct prohibited so that citizens may conform their behavior to the dictates of the law. *See State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710, 711 (1992) (child neglect statute could not be used to prosecute pregnant women for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Johnson*, 602 So. 2d at 1290. Both the Nevada and Kentucky supreme courts noted that the *Johnson*, *Gray*, and *Hardy* rulings were mandated by federal due process principles. In this regard, the Nevada high court noted:

> Courts in other jurisdictions have also held that the respective criminal statutes did not apply to the passage of harmful substances from a mother to her child through the umbilical cord. *See, e.g., Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *Johnson v. State*, 602 So. 2d 1266 (Fla. 1992); *State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710 (Ohio 1992); *People v. Hardy*, 188 Mich. App. 305,

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[13] *See* Georgia Const. Art. VI, c V, Para. III (1997).

> 469 N.W.2d 50 (Mich. Ct. App. 1991). These cases address statutes similar in effect to the one at issue here in Nevada. All of these courts concluded that, properly construed, the statutes involved do not intend to punish an expectant mother's drug use which is potentially injurious to her child. *Each court reasoned that such a construction renders the statute impermissibly vague.*

Encoe, 885 P.2d at 598 (emphasis added). The Kentucky supreme court used similar language. *See Welch*, 864 S.E.2d at 283 ("[A]ll of these cases point out in one way or another that to construe the statute involved otherwise makes it impermissibly vague....").

South Carolina has separated itself from all other states, not by virtue of any unique state laws, but rather by virtue of its aberrant interpretation of federal due process principles. South Carolina's protection of fetuses through tort and feticide laws addressing the conduct of third parties does not distinguish its approach from that of other states.[14] Nor does South Carolina's child neglect statute differ from that of most other states, which also employ the term "child," and were similarly guided by federal legislation intended to protect children, not fetuses.[15]

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[14] *See, e.g.*, Michael P. Penick, *Wrongful Death of a Fetus*, 19 Am. Jur. Proof of Facts 3d 107 (1993); *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992) (drunk driver could be convicted of second degree manslaughter for causing injury to fetus which died after being born alive).

[15] Section 20-7-50, enacted as part of South Carolina's Child Protection Act of 1977, was intended to bring the state into compliance with the Federal Child Abuse Prevention and Treatment Act of 1974, Pub. L. 93-247, § 3, Jan. 31, 1974, 88 Stat. 5. *See* John D. Elliott, *Child Protection Act of 1977 with Commentary* (March 1980); *see also* Douglas Besharov, *The Legal Aspect of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 459-61 (1977-78).

II. THE SOUTH CAROLINA SUPREME COURT MISCONSTRUED THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS NOTICE AND THUS UNFORESEEABLY EXPANDED THE STATE'S CHILD NEGLECT STATUTE

This Court has long and diligently safeguarded the basic due process principle that all criminal statutes must provide fair warning of the prohibited conduct so that no person is held criminally responsible for conduct that he or she could not reasonably understand to be proscribed. *See, e.g., United States v. Lanier*, __ U.S. __, 117 S.Ct. 1219, 1225 (1997); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954)). As plainly stated in *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939): "[A]ll [persons] are entitled to be informed as to what the State commands or forbids."

In this case, petitioners were "given not only no `fair warning,' but *no warning whatever*," *Bouie v. Columbia*, 378 U.S. 347, 355, 84 S.Ct. 1697, 1703 (1964) (emphasis added), that, when they became pregnant while substance addicted, their circumstances would be deemed "child neglect" under § 20-7-50. Neither the plain language of the statute, prior judicial interpretation, nor the decisions from *any* court in the country could have indicated to petitioners that this statute might apply to their situation. *See id.* at 356, 84 S.Ct. at 1704. As a result, the *Whitner* decision represents a particularly deplorable violation of the well-established principles of constitutional law:

> When a[n] ... unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

Bouie, 378 U.S. at 354-552, 84 S.Ct. at 1703; *see also Lanier*, 117 S.Ct. at 1225; *Marks v. United States*, 430 U.S. 188, 191-

92, 97 S.Ct. 990, 992-93 (1977); *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199 (1973); *Rabe v. Washington*, 405 U.S. 313, 316, 92 S.Ct. 993, 995 (1972); *Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563 (1971).

In *Bouie*, the Court made clear that the South Carolina Supreme Court could not re-write its criminal trespass law to punish two African-American protesters who refused to leave a segregated restaurant when asked to do so. 378 U.S. 347, 84 S.Ct. 1697 (1964). In reversing the convictions of the two student protesters, the Court stated:

> The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

Id. at 363, 84 S.Ct. at 1707.

Here, as in *Bouie*, the crime for which petitioners were convicted was "not enumerated in the statute." 378 U.S. at 363, 84 S.Ct. at 1707. Like the trespass statute which, "[b]y its terms," did not prohibit the act of "remaining on premises after being asked to leave," *id.* at 355, 84 S.Ct. at 1703, South Carolina's child neglect statute does not, by its terms, apply to viable fetuses. *See Whitner*, 492 S.E.2d at 787 (Finney, C.J. dissenting). (23a-25a) In fact, consistent with the plain and ordinary meaning of the statutory language, the South Carolina Supreme Court, prior to its decision in *Whitner*, as well as all lower courts in the state, had interpreted this specific statute as applying only to cases involving the physical or emotional abuse of a child.

As in *Bouie*, where the state court's interpretation was "inconsistent" with the law of other states, 378 U.S. at 361, 84 S.Ct. at 1706, the *Whitner* court's interpretation of § 20-7-50 is inconsistent with its sister state courts' interpretations of

similar statutes.[16] *See* pp. 13 to 16, *supra*. In fact, petitioners, based on other state decisions that found federal constitutional violations, *see id.*, could only believe that the constitution barred the application of South Carolina's child endangerment law to their conduct during pregnancy.

Moreover, most courts, including this one, have concluded that the plain and ordinary meaning of the words "child" and "person" do *not* include the unborn. *See Burns v. Alcala*, 420 U.S. 575, 580, 95 S.Ct. 1180, 1184 (1975) ("[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning," the term "dependent child," as used in the provisions of Title IV of the Social Security Act of 1935 as amended, did not include the unborn);[17] *but see Whitner*, 492 S.E.2d at 778. (5a) Indeed, lower courts in South Carolina also rejected the interpretation recently propounded by the South Carolina Supreme Court, holding that such an

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[16] *See, e.g., In re Valerie D.*, 223 Conn. 492, 515, 613 A.2d 748, 760 (1992) (rejecting application of parental termination statute to a woman who used cocaine while pregnant, concluding that "the definition of `child' as a `person under sixteen years of age' suggests a limitation of that definition to a person who has been born, since that is the ordinary beginning point of one's `age'"); *State ex rel. Angela M.W. v. Kruzicki*, 209 Wis.2d 112, 561 N.W.2d 729 (1997) (prohibiting detention of a pregnant woman under statute authorizing protective custody of a "child," as the legislature did not intend to include "fetus" within the definition of "child").

[17] *See also In re Adoption of Nelson*, 202 Kan. 663, 666, 451 P.2d 173, 176 (1969) (noting that "[we] do not ordinarily use the term child to mean an unborn child," the nine month gestation period cannot be included in computation period of a father's failure to assume parental duties).

interpretation is not consonant with the ordinary understanding of the term "child."[18]

Like *Bouie*, in which the Court considered the fact that the state's own legislature believed that its trespass statute did not cover notice after entry as evidenced by specific legislative activity on the subject, 378 U.S. at 361-62, 84 S.Ct. at 1707, the Legislature's extensive activity on the subject of substance addicted, pregnant women indicates that it also did not consider that existing laws addressed this issue. *See* 492 S.E.2d at 787 (Moore, A.J. dissenting). (25a-26a)

In support of its holding that petitioners had fair notice that their behavior constituted child endangerment pursuant to state law, the *Whitner* court relied on petitioners' presumptive knowledge of the "well documented" fact that cocaine use during pregnancy "can cause serious harm to the viable unborn child." *Whitner*, 492 S.E.2d at 782. (13a) However, absent a consensus within the medical community regarding the possible teratogenic risks of cocaine (especially as compared to the consensus on the dangers of tobacco and alcohol),[19] petitioners cannot be deemed to have received

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[18] For example, in *Tolliver v. State*, No. 90-CP-23-5178, Order at 5 (Ct. C. P. Greenville Cty, S.C. Aug. 10, 1992), *cert. denied*, (Mar. 10, 1993) (L. 171-77), the court granted post-conviction relief to a woman who pled guilty to child neglect. In doing so, the *Tolliver* court concluded that "[t]o sustain the position of the State, the word `child' used in the statute must be interpreted to include `fetus.' Such is not the plain and ordinary meaning generally given the word `child'". *See also Sullivan v. State*, No. 93-CP-23-3223, Order at 3 (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994) ("When the South Carolina legislature has meant fetus, they have used the word `fetus.' *See* S.C. Code of Laws Section 44-41-10(a), (f) and (1)"). (L. 153-57)

[19] *See Amicus Curiae* Brief of the National Association of

constitutionally sufficient notice that their conduct would be punishable under § 20-7-50.

Furthermore, petitioners cannot be charged with notice given the principle that the imposition of criminal penalties for one's status violates the Eighth Amendment to the Constitution. *See Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962) (addiction cannot be the basis for criminal prosecution under the Eighth Amendment's prohibition against cruel and unusual punishment). Similarly, petitioners could not have anticipated that they would be punished for becoming pregnant and carrying those pregnancies to term despite their addiction problems. *See Planned Parenthood v. Casey*, 505 U.S. 833, 859, 112 S.Ct. 2791, 2811 (1992) (right to privacy in reproductive decisionmaking includes a woman's decision to become pregnant and carry to term). Nor could they have known that their actions with regard to their own bodies would be treated the same as those of the strangers in *Hall*, 236 S.C. 257, 113 S.E.2d 790, *Fowler*, 244 S.C. 608, 138 S.E.2d 142, and *Horne*, 282 S.C. 444, 319 S.E.2d 703.[20] *Cf. State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (expectant mother may not be criminally charged with the death of her child resulting from self-inflicted injuries during the third trimester of pregnancy); *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988) (refusing to recognize tort of maternal prenatal negligence).

Alcoholism and Drug Abuse Counselors, *et. al.* to be filed.

[20] Nor could petitioners have known from these decisions, that South Carolina would conclude that a viable fetus is a person when this Court has rejected such broad declarations. *See, e.g., Roe v. Wade*, 410 U.S. 113, 158-162, 93 S.Ct. 705, 729-31 (1973) (finding that state wrongful death actions based on prenatal injuries are designed to vindicate parents' interests, and that fetuses are not persons).

Given this decisional authority, petitioners could not have anticipated that they would not only be punished, but, in fact, punished *more* harshly for child neglect than for other offenses such as drug possession, merely because they were pregnant and substance dependent. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose.").

III. THE SOUTH CAROLINA SUPREME COURT HAS MISCONSTRUED THE CONSTITUTIONAL PROHIBITION AGAINST VAGUE CRIMINAL STATUTES

As the courts of numerous sister states have unequivocally recognized, efforts to expand the reach of pre-existing child endangerment statutes to cover a woman's conduct during pregnancy necessarily renders these laws unconstitutionally vague. *See* pp. 13 to 16, *supra*.

This Court has long adhered to the principle that laws which are so ambiguous that a person of common understanding cannot know what conduct is forbidden are unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

The Court recently reaffirmed the vitality of this principle in the criminal context in *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524, 114 S.Ct. 1747, 1754 (1994). In that case, the Court specifically noted that the due process concerns embodied in the vagueness test are twofold; the doctrine is intended to ensure that (1) citizens are given fair notice of what is prohibited so that they may conform their behavior to the dictates of the law, *Papachristou v. City of*

Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843 (1972) and (2) the discretion of law enforcement officials is limited by explicit legislative standards so as to preclude arbitrary, capricious, and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1689 (1971); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91, 86 S.Ct. 211, 213-14 (1965). As demonstrated below, § 20-7-50, construed to apply to a woman's conduct during pregnancy, is impermissibly vague because it fails both prongs of the constitutional test. *See Harriss*, 347 U.S. at 617, 74 S.Ct. at 812; *see Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42 (1940).

The *Whitner* court's new interpretation, coupled with the plain language of the statute, promotes a construction of the statute that is so broad that a woman of ordinary intelligence must presume that her every action might fall within its proscriptions.[21] Indeed, the absence of specific parameters *alone* renders the statute constitutionally infirm, because individuals arguably covered "must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926).

Where, as here, the actual activities proscribed are so uncertainly defined, this Court has struck the offending ordinance for vagueness.[22] *See, e.g., Palmer*, 402 U.S. at 545,

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[21] Because § 20-7-50, as construed by the *Whitner* court, proscribes "no comprehensible course of conduct at all," it "may not constitutionally be applied to any set of facts." *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 319 (1975); *see Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

[22] The court below seeks to avoid the difficulties engendered by the vague language of the statute merely by announcing that the alleged acts committed by petitioner clearly fall within the statute's proscriptions as newly interpreted. *See*

91 S.Ct. at 1564 ("suspicious person ordinance" making it unlawful to wander about the streets or be out at late or unusual hours held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, (1921). In this regard, the construction of § 20-7-50 suffers from the same flaw deemed fatal by the Court in *L. Cohen Grocery*. *Id.* at 86, 41 S.Ct. at 299. In striking the statute in that case, the Court noted that the law, as worded, "forbids no specific or definite act" and "leaves open ... the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at 89, 41 S. Ct. at 300.

Neither the statute itself nor the recent judicial interpretation provides a road map indicating which paths are now closed to pregnant women. A woman's conduct with respect to her own body -- conduct, such as smoking, drinking or taking prescription medications, not previously subject to punishment -- may now be determined to fall within the broad and undefined prohibitions of the statute. *See, e.g., Stallman*, 12 Ill. 2d at 276-80, 331 N.E.2d at 359-61. Thus, under the new interpretation, women, for example, undergoing chemotherapy that may endanger a fetus risk arrest and prosecution for child endangerment, as do women whose jobs may pose health risks to a developing fetus, *cf. U.A.W. v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991), as well as women who refuse caesarean sections believed necessary to protect the fetus. *Cf. In re A.C.*, 573 A.2d 1235 (D.C. 1990) (*en banc*) (reversing decision ordering caesarean section performed in the name of fetal rights over the objections of woman and physician).[23] However, common experience has

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Whitner, 492 S.E.2d at 785. (19a) However, as this Court has long stressed, "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

[23] *See also People v. Doe*, 260 Ill. App. 3d 392, 632 N.E.2d 326

not created a general understanding of the criminality of such actions. *See L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298.

Beyond the ambiguity regarding which activities will render one subject to prosecution, § 20-7-50 is unconstitutionally vague because a pregnant woman cannot ascertain at what moment the fetus becomes viable and her actions become punishable as felony child neglect. As this Court unequivocally stated in *Colautti v. Franklin*, 439 U.S. 379, 388, 99 S.Ct. 675, 682 (1979), the determination of viability is necessarily "a matter for medical judgment." *Id.* at 395-96, 99 S.Ct. at 686.

These constitutional infirmities are further exacerbated by the fact that the new construction of the statute: 1) encompasses a woman's negligent omissions, as well as her affirmative acts; 2) fails to incorporate any intent requirement; and 3) arbitrarily burdens a substantial amount of constitutionally protected conduct.

By reaching a woman's omissions as well as her commissions, the new construction of § 20-7-50 expands the scope of potential liability to the entire universe of a pregnant woman's behavior. As Justice Moore observed:

> In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking?

492 S.E.2d at 788 (Moore, A. J. dissenting). (26a)

(1st Dist. 1994); *In re Brown*, 228 Ill. 525, 689 N.E.2d 397 (App. Ct. 1st Dist. Dec. 1997) (overturning decision to restrain forcibly and sedate pregnant woman who refused a blood transfusion ordered to protect the fetus she carried).

Under circumstances such as these, where one may be condemned in a criminal case for the mere failure to act, the need for adequate notice is even greater than when the prohibited conduct is specifically delineated. For this reason, the Court has traditionally scrutinized laws which criminalize omissions more closely than those which penalize solely affirmative acts.[24] *See, e.g., Kolender v. Lawson*, 461 U.S. at 358-59, 103 S.Ct. at 1858-59 (invalidating on vagueness grounds a law which required persons to produce on demand "credible and reliable" identification); *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 243 (1957). Because § 20-7-50 has been interpreted in a manner which creates the possibility of prosecution of pregnant women for their failure to act, while it concomitantly fails to delineate any parameters for liability due to non-feasance, it cannot survive scrutiny. The Court should grant the petition to remedy this constitutional error.

The uncertainty as to § 20-7-50's proscriptions is compounded by the lack of any requirement of proof of intent. In this case, no effort was made to determine if petitioners, who requested treatment for their substance addiction, took drugs with the intention of hurting their children.[25] Moreover, because the statute had been previously

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[24] "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983) (citation omitted). Moreover, this concern has led to the invalidation of criminal statutes on their face, "even when they could conceivably have some valid application." *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1859.

[25] As the National Association on Perinatal Addiction Research and Education ("NAPARE") has stated: "These women are addicts. They do not want or intend to harm their unborn children by using drugs." NAPARE Policy Statement No. 1, *Criminalization of Prenatal Drug Use; Punitive Measures Will Be Counter-Productive*, 2 (1990) (L. 225-26); *see also*

interpreted as providing for strict criminal liability, it seems likely that there will be no such investigation in the future. *See State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) (holding that the Legislature intended that a violation be found regardless of whether the actor violated the statute with knowledge or intent). Thus, in the absence of any intent requirement, the statute, as newly interpreted, now imposes excessive criminal penalties[26] on individuals who unwittingly engage in one of an infinite number of unspecified, albeit proscribed, behaviors.

The Court's reasoning in *Colautti*, 439 U.S. at 390, 99 S.Ct. at 683, that an unclear criminal law is void for vagueness when the statute also lacks a meaningful intent requirement, clearly applies here. In invalidating the statute in *Colautti*, the Court stated:

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea. (Citations omitted).

Id. at 395 n.12, 99 S.Ct. at 685 n.12. (Citation omitted).[27]

Johnson, 602 So. 2d at 1295 n.5.

[26] *See* § 20-7-50 (providing for maximum penalty of 10 years in prison). Such a lengthy sentence underscores the inappropriateness of the new interpretation. As this Court recently noted in *Staples v. United States*, 511 U.S. 600, 615, 114 S.Ct. 1793, 1802 (1994): "the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 442, n.18, 98 S.Ct. 2864, 2876 n.18 (1978).

[27] The Court has recently emphasized that strict criminal liability offenses outside the reproductive rights context are disfavored. *See, e.g., Staples*, 511 U.S. at 605, 114 S.Ct. at 1796 (penal statutes must be construed "in light of the

In addition to the above, this Court has long emphasized that the potential for "arbitrary and discriminatory enforcement" is a particular evil that vagueness review is designed to combat. *See, e.g., Papachristou*, 405 U.S. at 170, 92 S.Ct. at 847 (standardless vagrancy law "permits and encourages an arbitrary and discriminatory enforcement of the law").[28] If a statute designed to regulate conduct does not enumerate specific rules and guidelines to govern its enforcement, neither police officers nor citizens can hope to conduct themselves in a lawful manner. *See Coates v. Cincinnati*, 402 U.S. 611, 614 n.4, 91 S.Ct. 1686, 1688 n.4 (1971). Indeed, this is precisely the problem engendered by the new interpretation of § 20-7-50. When left *entirely* to the discretion of law enforcement officials, the selection of which specific prenatal actions or omissions are to be prosecuted, *see Papachristou*, 405 U.S. at 165-70, 92 S.Ct. at 845-47, invites subjective and discriminatory enforcement. *Id.* at 170, 92 S.Ct. at 847.

As the Court further elucidated in *Kolender*, the absence of legislatively determined boundaries for law enforcement creates the "potential for arbitrarily suppressing" constitutionally protected liberties. 461 U.S. at 359, 103 S.Ct. at 1859; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191 (1982). In this case, there can be no doubt that the *Whitner* decision

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background rules of the common law" under which "the requirement of some mens rea for a crime is firmly embedded"); *United States Gypsum Co.*, 438 U.S. at 437-38, 98 S.Ct. at 2873-74 (holding that intent is an element of a criminal antitrust offense).

[28] In discussing the historical treatment of this prong of the analysis, the Court stressed in *Kolender*, 461 U.S. at 357-58 n.7, 103 S.Ct. at 1858 n.7, that "concern for minimal guidelines finds its roots as far back as [this Court's] decision in *United States v. Reese*, 92 U.S. 214, 221 (1876)...."

impinges upon a constellation of fundamental rights, including the right to privacy in reproductive decisionmaking, *see, e.g., Casey*, 505 U.S. at 895-98, 112 S.Ct. 2830-31, the right to privacy of medical information, *see, e.g., Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977), the right to be free from cruel and unusual punishment, *Robinson*, 370 U.S. at 660, 82 S.Ct. at 1417, and the right to be free from laws that discriminate on the basis of gender by targeting pregnant women and new mothers for special criminal penalties. *See, e.g., United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996) (establishing the standard of review for claims of gender discrimination). While these rights are clearly implicated by the *Whitner* decision, this Court need not reach these issues in this case. *See Kolender*, 461 U.S. at 3362, 103 S.Ct. at 1860 (stating that the Court "find[s] it unnecessary to decide other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so").

The South Carolina Supreme Court, by reinterpreting the statute, has now improperly affirmed the state's unconstitutional construction of § 20-7-50, as well as sanctioned enforcement of a discriminatory policy. If left unaddressed, this new interpretation, far from resolving ambiguities, will, instead, invite similar unconstitutional applications in the future.

CONCLUSION

As evidenced by the *Whitner* decision, when intense political controversy and judicial overreaching compromise logic and undermine fundamental constitutional guarantees, the resulting legal approach is necessarily flawed. By retroactively applying a new, judicially created crime of fetal abuse, the court below "walk[ed] down a path that the law, public policy, reason and common sense forbid it to tread." *Johnson*, 602 So. 2d at 1297. In so doing, the *Whitner* court created an intolerable conflict among the nation's state high

courts, and articulated a construction of the scope of the constitutional protections embodied in the Fourteenth Amendment that is directly at odds with the decisions of this Court, as well as that of South Carolina's sister state courts. This Court must grant the petition to redress this error.

Dated: New York, New York
March 19, 1998

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Cornelia Whitner, Respondent,

v.

State of South Carolina, Petitioner.

ORDER GRANTING
PETITION FOR REHEARING

In the opinion we originally issued, we declined to reach any constitutional issues, finding Whitner had not raised them to the Post Conviction Relief Court. Given the record before us then, we had no way of knowing that such issues had been raised by way of a brief to the Post Conviction Relief Court. In connection with her Petition for Rehearing, Whitner has supplemented the record, and we see that the issues were indeed raised. Whitner had the burden of providing an adequate record on appeal; given her initial failure to do so, we need not reach the constitutional issues. Nevertheless, in the interest of resolution of this case and other cases presenting similar or identical issues, we believe it prudent to address the constitutional issues Whitner presents.

Therefore, after a careful consideration of Whitner's Petition for Rehearing, it is ordered that the majority and dissenting opinions heretofore filed, Op. No. 24468, filed July 15, 1996, be withdrawn and the attached majority and

dissenting opinions be substituted. The Petition for Rehearing is granted without oral argument.

s./Ernest A. Finney, Jr. C.J.

s./Jean H. Toal A.J.

s./James E. Moore A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cornelia Whitner, Respondent,

V.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Pickens County
Frank Eppes, Trial Judge
Larry R. Patterson,
Post-Conviction Judge

Opinion No. 24468
Heard May 31, 1995 -
Refiled October 27, 1997

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Attorney General Teresa Nesbitt Cosby, Staff Attorney David K. Avant, all of Columbia, for Petitioner.

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Stephen P. Williams, of Columbia, for Amici Curiae South Carolina Medical Association; American Medical Association & American College of Obstetricians & Gynecologists.

Robert H. Hood and Joseph C. Wilson, IV, both of Hood Law Firm, of Charleston, for Amici Curiae City of Charleston, South Carolina; Board of Trustees and various employees of the MUSC; Reuben Greenberg, Chief of Charleston Police Department; Charles Molony Condon, former Ninth Circuit Solicitor; and David Schwacke, current Ninth Circuit Solicitor.

Susan Dunn, of Charleston; Carol E. Tracy and Susan Frietsche, of Philadelphia, PA, for Amici Curiae The American Public Health Association; American Medical Women's Association; American Nurses Association; Coalition on Addiction, Pregnancy and Parenting; Drug Policy Foundation; National Council on Alcoholism and Drug Dependence; National Perinatal Association; Planned Parenthood of Central South Carolina; National Women's Health Network; NOW Legal Defense and Education Fund; South Carolina Chapter of The National Organization for Women; South Carolina Nurses Association; and The Women's Law Project and Operation PAR.

John D. (Jay) Elliott, of Columbia, for Amicus Curiae The Alliance for South Carolina's Children.

TOAL, A.J.: This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's

Code (the Code), S.C. Code Ann. § 20-7-50 (1985).[1] We hold the word "child" as used in that statute includes viable fetuses.

FACTS

On April 20, 1992, Cornelia Whitner (Whitner) pled guilty to criminal child neglect, S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of Whitner's ingestion of crack cocaine during the third trimester of her pregnancy. The circuit court judge sentenced Whitner to eight years in prison. Whitner did not appeal her conviction.

Thereafter, Whitner filed a petition for Post Conviction Relief (PCR), pleading the circuit court's lack of subject matter jurisdiction to accept her guilty plea as well as ineffective assistance of counsel. Her claim of ineffective assistance of counsel was based upon her lawyer's failure to advise her the statute under which she was being prosecuted might not apply to prenatal drug use. The petition was granted on both grounds. The State appeals.

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[1] Section 20-7-50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. See S.C. Code Ann. § 20-7-50 (Supp. 1994). We cite the earlier version of the statute in this opinion because Whitner was prosecuted under that version. The language in the amended section relating to the actions constituting the crime is identical to the language under which Whitner was prosecuted. In other words, although the characterization of and penalty for the crime have changed, the acts constituting the crime have not.

LAW\ANALYSIS

A. Subject Matter Jurisdiction

The State first argues the PCR court erred in finding the sentencing circuit court lacked subject matter jurisdiction to accept Whitner's guilty plea. We agree.

Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. See *Williams v. State*, 306 S.C. 89, 410 S.E.2d 563 (1991). For the sentencing court to have had subject matter jurisdiction to accept Whitner's plea, criminal child neglect under section 20-7-50 would have to include an expectant mother's use of crack cocaine after the fetus is viable.[2] All other issues are ancillary to this jurisdictional issue.

S.C. Code Ann. § 20-7-50 (1985) provides:

> Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child*

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[2] The State argues we need not reach the issue of the applicability of section 20-7-50 to viable fetuses, because the indictment alleged a violation on the date of the child's birth. We disagree. The basis for the indictment was the presence of cocaine in the newborn infant. Unless Whitner gave her child cocaine after the child's birth, which no one has alleged, the behavior giving rise to the abuse and neglect charge necessarily occurred before the child was born. Moreover, the record of Whitner's original hearing and the hearing on her petition for Post Conviction Relief make clear the conviction was for her neglecting her child by ingesting crack cocaine during pregnancy. For that reason, we must determine whether section 20-7-50 applies to such behavior.

> or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).

The State contends this section encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*.

Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey,* 311 S.C. 555, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n,* 306 S.C. 41, 410 S.E.2d 245 (1991). Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *See Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953).

South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy,* 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died

four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, *inter alia,* a fetus is thought to have no separate being apart from the mother.

We found such a reason for exclusion from recovery "unsound, illogical and unjust," and concluded there was "no medical or other basis" for the "assumed identity" of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: "We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother *is a person.*" *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

Four years later, in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted Hall as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

> Since a viable child is a *person before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant' to the injury of the child . . .
>
> *Once the concept of the unborn, viable child as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.

Id. at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

More recently, we held the word "person" as used in a *criminal* statute includes viable fetuses. *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina's murder statute, S.C. Code Ann. § 16-3-10 (1976). The defendant in that case stabbed his wife, who was nine months' pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency Caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

This Court disagreed. In a unanimous decision, we held it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward, supra*). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The policies enunciated in the Children's Code also support our plain meaning reading of "person." S.C. Code Ann. § 20-7-20(C) (1985), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can

be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word "person" to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to *all* children who have need of services." S.C. Code Ann. § 20-7-20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.

Whitner advances several arguments against an interpretation of "person" as used in the Children's Code to include viable fetuses. We shall address each of Whitner's major arguments in turn.

Whitner's first argument concerns the number of bills introduced in the South Carolina General Assembly in the past five years addressing substance abuse by pregnant women. Some of these bills would have criminalized substance abuse by pregnant women;[3] others would have addressed the issue through mandatory reporting, treatment, or intervention by social service agencies.[4] Whitner suggests

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[3] *See, e.g.*, S. 4032 (1993)(proposing making it a crime for a pregnant woman to ingest a controlled substance); H. 4486 (1994) (proposing amendment to section 20-7-50 to apply to actions of pregnant women).

[4] *See* S.1495 (1989-1990), reintroduced as S.75 (1990-1991) (requiring drug testing of newborns and to include within civil definition of neglect any newborn testing positive for

that the introduction of several bills touching the specific issue at hand evinces a belief by legislators that prior legislation had not addressed the issue. Whitner argues the introduction of the bills proves that section 20-7-50 was not intended to encompass abuse or neglect of a viable fetus.

We disagree with Whitner's conclusion about the significance of the proposed legislation. Generally, the legislature's subsequent acts "cast no light on the intent of the legislature which enacted the statute being construed." *Home Health Servs., Inc. v. DHEC*, 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989) (citations omitted). Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent. *E.g., State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). Here, we see no reason to look beyond the statutory language. *See Timmons v. South Carolina Tricentennial Comm'n, supra* (where statute's meaning can be determined from its language, no need to look beyond such

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controlled substance); S.1470 (1989-1990), reintroduced as S.79 (1991) (mandating reporting to DSS pregnant woman believed to have used controlled substance; providing for education and drug treatment); H. 3858 (1990-1991)(requiring reporting of pregnant woman believed to be using controlled substance and expanding civil definition of "abused child" to include newborn testing positive for illegal drugs); S. 986 (1991)(mandating drug testing on newborn infants, requiring reporting such infants as abused under civil abuse laws, and requiring reversible sterilization or implantation of birth control until mother completes drug treatment program); S. 155 (1992-1994) (permitting testing newborns for controlled substances and reporting such test results to DSS for limited purposes); S. 1256 (1992), reintroduced as S. 150 (1992-1993) (permitting referral to DHEC of families with children prenatally exposed to drugs and giving pregnant women priority in drug treatment programs).

language). Additionally, our existing case law strongly supports our conclusion about the meaning of the statute's language.

Whitner also argues an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature. Specifically, she claims if we interpret "child" to include viable fetuses, *every* action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute. For example, a woman might be prosecuted under section 20-7-50 for smoking or drinking during pregnancy. Whitner asserts these "absurd" results could not have been intended by the legislature and, therefore, the statute should not be construed to include viable fetuses.

We disagree for a number of reasons. First, the same arguments against the statute can be made whether or not the child has been born. After the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act -- consuming alcoholic beverages -- is itself legal. Obviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

Moreover, we need not address this potential parade of horribles advanced by Whitner. In *this* case, which is the only case we are called upon to decide here, certain facts are clear. Whitner admits to having ingested crack cocaine during the third trimester of her pregnancy, which caused her child

to be born with cocaine in its system. Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. *See, e.g.,* Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus,* 327 NEW ENG. J. MED. 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy,* 313 NEW ENG. J. MED. 666 (1985). There can be no question here Whitner endangered the life, health, and comfort of her child. We need not decide any cases other than the one before us.

We are well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes. *See, e.g., Johnson v. State,* 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch,* 864 S.W.2d 280 (Ky. 1993); *State v. Gray,* 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court,* 75 Cal. App. 3d 214 (1977); *State v. Carter,* 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers,* 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster,* 419 S.E.2d 32 (Ga. Ct. App. 1992), *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy,* 469 N.W.2d 50 (Mich. Ct. App.), *app. denied,* 471 N.W.2d 619 (Mich. 1991); *Commonwealth v. Kemp,* 643 A.2d 705 (Pa. Super. Ct. 1994). Many of these cases were prosecuted under statutes forbidding delivery or distribution of illicit substances and depended on statutory construction of the terms "delivery" and "distribution." *See, e.g., Johnson v. State, supra*; *State v. Luster, supra*; *People v. Hardy, supra.* Obviously, such cases are inapplicable to the present situation. The cases concerning child endangerment statutes or construing the terms "child" and "person" are also distinguishable, because the states in which these cases were decided have entirely different bodies of case law from South Carolina. For example, in *Commonwealth v. Welch,* the Kentucky Supreme Court specifically noted Kentucky law has

not construed the word "person" in the criminal homicide statute to include a fetus (viable or not). *Welch,* 864 S.W.2d at 281. In *Reyes v. Superior Court,* the California Court of Appeals noted California law did not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes, and that it was thus improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. *Reyes,* 75 Cal. App. 3d at 217.

Massachusetts, however, has a body of case law substantially similar to South Carolina's, yet a Massachusetts trial court has held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus. *See Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990).[5] Specifically, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured *in utero* who are not subsequently born alive. *Mone v. Greyhound Lines, Inc.,* 331 N.E.2d 916 (Mass. 1975). Similarly, Massachusetts law permits homicide prosecutions of third parties who kill viable fetuses. *See Commonwealth v. Cass,* 467 N.E.2d 1324 (Mass. 1984)(ruling a viable fetus is a person for purposes of vehicular homicide statute); *Commonwealth v. Lawrence,* 536 N.E.2d 571 (Mass. 1989)(viable fetus is a person for purposes of common law crime of murder). Because of the similarity of the case law in Massachusetts to ours, the *Pellegrini* decision merits examination.

In *Pellegrini,* the Massachusetts Superior Court found that state's distribution statute does not apply to the distribution of an illegal substance to a viable fetus. The statute at issue forbade distribution of cocaine to persons under the age of eighteen. Rather than construing the word

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[5] We note that *Pellegrini* was decided by a Massachusetts superior court. To date, no appellate court in Massachusetts has addressed this issue directly.

"distribution," however, the superior court found that a viable fetus is not a "person under the age of eighteen" within the meaning of the statute. *Pellegrini,* slip op. at 11. In so finding, the court had to distinguish *Lawrence* and *Cass, supra,* both of which held viable fetuses are "persons" for purposes of criminal laws in Massachusetts.

The Massachusetts trial court found *Lawrence* and *Cass* "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." *Pellegrini,* slip op. at 11. In other words, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents. Under this rationale, the viable fetus lacks rights of its own that deserve vindication. Whitner suggests we should interpret our decisions in *Hall, Fowler,* and *Home* to accord rights to the viable fetus only when doing so protects the special parent-child relationship rather than any individual rights of the fetus or any State interest in potential life. We do not think *Hall, Fowler,* and *Horne* can be interpreted so narrowly.

If the *Pellegrini* decision accurately characterizes the rationale underlying *Mone, Lawrence,* and *Cass,* then the reasoning of those cases differs substantially from our reasoning in *Hall, Fowler,* and *Horne, supra.* First, *Hall, Fowler,* and *Horne* were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, *Horne* also rested on the *State's* -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus. See *Roe v. Wade,* 410 U.S. 113, 165, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973); see also *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Webster v. Reproductive Health Servs.,* 492 U.S.

490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). If, as Whitner suggests we should, we read *Horne* only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same aces. We decline to read *Horne* in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law -- protection of the viable fetus -- is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini.*

The dissent contends that our holding in this case is inconsistent with *Doe v. Clark,* 318 S.C. 274, 457 S.E.2d 336 (1995). Specifically, it suggests that *Doe v. Clark,* in which we construed another provision of the Children's Code, stands for the proposition that the definition of "child" in S.C. Code Ann. § 20-7-50 (1985) means a "child in being and not a fetus." Contrary to the dissent's characterization of that case, *Doe* turned on the specific language in the consent provisions of the Adoption Act, S.C. Code Ann. §§ 20-71690 and - 1700 (Law. Co-op Supp. 1994).

In *Doe,* Wylanda Clark, who was pregnant, signed a consent form allowing the Does to adopt the child upon its birth. After the child was born, Clark decided she wanted to keep the baby and attempted to argue that the consent she executed was void because it did not contain certain information required by statute. The trial judge held Clark's consent was valid. Clark appealed.

On appeal, we reversed the trial court. However, the basis for our reversal was not that "child" as defined in the Children's Code only includes born children, but that the adoption statutes contemplate that the natural mother's consent to the adoption must be given after the birth of the child to be adopted. *Doe,* 318 S.C. at 276, 457 S.E.2d at 337.

Specifically, section 20-7-1700(A)(3) requires the consent form to contain the race, sex, and *date of birth* of the adoptee, as well as any names by which the adoptee has been known. Clearly, the date of birth requirement could not be fulfilled until after the birth of the child. Furthermore, section 20-7-1690, which specifies who must consent to an adoption, provides that consent is required of "the mother of a child *born* when the mother was not married." (emphasis added). Citing these sections as well as the Children's Code's definition of child, we concluded that a natural mother cannot consent to adoption until after the birth of her child. *Id.* We did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly.

Finally, the dissent implies that we have ignored the rule of lenity requiring us to resolve any ambiguities in a criminal statute in favor of the defendant The dissent argues that "[a]t most, the majority only suggests that the term 'child' as used in § 20-7-50 is ambiguous," and that the ambiguity "is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide."

Plainly, the dissent misunderstands our opinion. First, we do not believe the statute is ambiguous and, therefore, the rule of lenity does not apply. Furthermore, our interpretation of the statute is based primarily on the plain meaning of the word "person" as contained *in the statute.* We need not go beyond that language. However, because our prior decisions in *Murphy, Fowler,* and *Horne* support our reading of the statute, we have discussed the rationale underlying those holdings. We conclude that both statutory language and case law compel the conclusion we reach. We see no ambiguity.

B. Ineffective Assistance of Counsel

The State next argues the PCR court erred in holding Whitner received ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a PCR applicant must show (1) deficient performance by her attorney and (2) prejudice resulting therefrom. *Strickland v. Washington,* 466 U.S. 668, 104 S. CL 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice when challenging a guilty plea, the applicant must show that but for counsel's deficient performance, the applicant would not have pled guilty. *Hill v. Lockhart,* 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985). In this case, the basis for the ineffective assistance claim was the failure of Whitner's counsel to inform her section 20-7-50 did not apply to prenatal drug use. Whitner contends she would not have pled guilty if her lawyer had given her such advice.

Given our holding that section 20-7-50 *is* applicable to an expectant mother's illegal drug use after the fetus is viable, we cannot say Whitner's lawyer's failure to advise her of the statute's *inapplicability* constituted deficient performance. In fact, both the unambiguous language of the statute and this Court's prior case law justify counsel's belief the child neglect statute applied to Whitner's actions. Therefore, the PCR court erred in ruling Whitner received ineffective assistance of counsel.

C. Constitutional Issues

1. Fair Notice/Vagueness

Whitner argues that section 20-7-50 does not give her fair notice that her behavior is proscribed.[6] We disagree.

The statute forbids any person having legal custody of a child from refusing or neglecting to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the *plain* meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.

2. Right to Privacy

Whitner argues that prosecuting her for using crack cocaine after her fetus attains viability unconstitutionally burdens her right of privacy, or, more specifically, her right to carry her pregnancy to term. We disagree.

Whitner argues that section 20-7-50 burdens her right of privacy, a right long recognized by the United States Supreme Court. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). She

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[6] In a related argument, Whitner suggests section 20-7-50 is void for vagueness. This argument lacks merit. As we noted in our interpretation of section 20-7-50, *supra,* the same argument could be made about the statute as applied to a child who has already been born.

cites *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), as standing for the proposition that the Constitution protects women from measures penalizing them for choosing to carry their pregnancies to term.

In *LaFleur,* two junior high school teachers challenged their school systems' maternity leave policies. The policies required "every pregnant school teacher to take maternity leave without pay, beginning [four or] five months before the expected birth of her child." *Id.* at 634, 94 S. Ct. at 794, 39 L. Ed. 2d at 57. A teacher on maternity leave could not return to work "until the beginning of the next regular school semester which follows the date when her child attains the age of three months." *Id.* at 634-35, 94 S. Ct. at 794, 39 L. Ed. 2d at 57. The two teachers, both of whom had become pregnant and were required against their wills to comply with the school systems' policies, argued that the policies were unconstitutional.

The United States Supreme Court agreed. It found that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.* at 640, 94 S. Ct. at 796, 39 L. Ed. 2d at 60. The Court then scrutinized[7] the policies to determine whether "the interests advanced in support of" the policy could "justify the particular procedures [the School Boards] ha[d] adopted." *Id.* at 640, 94 S. Ct. at 796, 39 L. Ed. 2d at 60. Although it found that the purported justification for the policy -- continuity of instruction -- was a "significant and legitimate educational goal," the Court concluded that the "absolute requirement[] of termination at the end of the fourth or fifth month of pregnancy" was not a rational means

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[7] The Court applied a rational relationship test, the least rigorous form of scrutiny.

for achieving continuity of instruction and that such a requirement "may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote." *Id.* at 642-43, 94 S. Ct. at 797-98, 39 L. Ed. 2d at 61-62. Finding no rational relationship between the purpose of the maternity leave policy and the means crafted to achieve that end, the Court concluded the policy violated the Due Process Clause of the Fourteenth Amendment.

Whitner argues that the alleged violation here is far more egregious than that in *LaFleur.* She first suggests that imprisonment is a far greater burden on her exercise of her freedom to carry the fetus to term than was the unpaid maternity leave in *LaFleur.* Although she is, of course, correct that imprisonment is more severe than unpaid maternity leave, Whitner misapprehends the fundamentally different nature of her own interests and those of the government in this case as compared to those at issue in *LaFleur.*

First, the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. See, e.g., *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The United States Supreme Court in *Casey* recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but *throughout* the expectant mother's pregnancy. See *Casey,* 505 U.S. at 877, 112 S. Ct. at 2821, 120 L. Ed. 2d at 716 (plurality opinion).

Even more importantly, however, we do not think any fundamental right of Whitner's -- or any right at all, for that matter -- is implicated under the present scenario. It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of

crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

Moreover, as a practical matter, we do not see how our interpretation of section 20-7-50 imposes a burden on Whitner's right to carry her child to term. In *LaFleur,* the Supreme Court found that the mandatory maternity leave policies burdened women's rights to carry their pregnancies to term because the policies prevented pregnant teachers from exercising a freedom they would have enjoyed but for their pregnancies. In contrast, during her pregnancy after the fetus attained viability, Whitner enjoyed the same freedom to use cocaine that she enjoyed earlier in and predating her pregnancy -- none whatsoever. Simply put, South Carolina's child abuse and endangerment statute as applied to this case does not restrict Whitner's freedom in any way that it was not already restricted. The State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather, the additional penalty simply recognizes that a third party (the viable fetus or newborn child) is harmed by the behavior.

Section 20-7-50 does not burden Whitner's right to carry her pregnancy to term or any other privacy right. Accordingly, we find no violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the PCR Court is **REVERSED**.

WALLER and BURNETT, JJ concur. FINNEY, C.J., and MOORE, A.J., dissenting in separate opinions.

FINNEY, C.J.: I respectfully dissent, and would affirm the grant of post-conviction relief to respondent Whitner.

The issue before the Court is whether a fetus is a "child" within the meaning of S.C. Code Ann. § 20-7-50 (1985), a statute which makes it a misdemeanor[1] for a "person having legal custody of any child or helpless person" to unlawfully neglect that child or helpless person. Since this is a penal statute, it is strictly construed against the State and in favor of respondent. *State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991).

The term child for purposes of §20-7-50 is defined as a "person under the age of eighteen" unless a different meaning is required by the circumstances. S.C. Code Ann. § 20-7-30 (1) (1985). We have already held that this same definition found in another part of the Children's Code means a child in being and not a fetus. *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). It would be incongruous at best to hold the definition of "child" in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.

More importantly, it is apparent from a reading of the entire statute that the word child in § 20-7-50 means a child in being and not a fetus. *See Jackson v. Charleston County School District,* 316 S.C. 177, 447 S.E.2d 859 (1994) (when construing a statute, we do not view its terms in isolation, but rather in the context of the entire statute and its intended

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[1] After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act No. 184, § 55 (effective January 1, 1994).

purpose). A plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, and not those which may harm fetuses. First, § 20-7-50 does not impose criminal liability on every person who neglects a child, but only on a person having legal custody of that child. The statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus. *See Stone v. State,* 313 S.C. 533, 443 S.E.2d 544 (1994)(statutes are construed so as to avoid absurd results). Second, § 20-7-50 refers to S. C. Code Ann. § 20-7-490 (1985 and Supp. 1994) for the definition of neglect. Section 20-7-490 defines a neglected child as one harmed or threatened with harm, and further defines harm. § 20-7-490(B), (C), and (D). The vast majority of acts which constitute statutory harm under §20-7-490 are acts which can only be directed against a child, and not towards a fetus.[2] The reliance upon § 20-7-490 in § 20-7-50 is further evidence that the term child as used in the child neglect statute does not encompass a fetus. Read in context, and in light of the statutory purpose of protecting persons of tender years[3] it is clear that "child" as used in § 20-7-50 means a child in being. *Jackson v. Charleston County School District, supra.*

At most, the majority only suggests that the term "child" as used in §20-7-50 is ambiguous. This suggestion of ambiguity is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance

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[2] Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.

[3] *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982)(construing § 16-3-1030, recodified as § 20-7-50).

on decisions in two different fields of the law, civil wrongful death and common law feticide. Here, we deal with the Children's Code, and the meaning of language used in a criminal statute under that Code. We have already indicated that a child within the meaning of §20-7-90(A)(1985), which criminalizes non-support, must be one already born. *State v. Montgomery,* 246 S.C. 545, 144 S.E.2d 797 (1965)(indictment for violation of predecessor of § 20-7-90(A) fatally defective for failing to identify the child by description or date of birth); *see also Doe v. Clark, supra.* Even if these wrongful death, common law, and Children's Code decisions are sufficient to render the term child in § 20-7-50 ambiguous, it is axiomatic that the ambiguity must be resolved in respondent's favor. *State v. Blackmon, supra.*

I would affirm.

MOORE, A.J.: I concur with the dissent in this case but write separately to express my concerns with today's decision.

In my view, the repeated failure of the legislature to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance. This Court should not invade what is clearly the sole province of the legislative branch. At the very least, the legislature's failed attempts to enact a statute regulating a pregnant woman's conduct indicate the complexity of this issue. While the majority opinion is perhaps an argument for what the law *should* be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course of judicial activism rejected by every other court to address the issue.

As discussed in the Chief Justice's dissent, we are bound by the rules of statutory construction to strictly

construe a criminal statute in favor of the defendant and resolve any ambiguity in her favor. *State v. Blackmon, supra.* I cannot accept the majority's assertion that the child abuse and neglect statute unambiguously includes a "viable fetus." If that is the case, then why is the majority compelled to go to such great lengths to ascertain that a "viable fetus" is a "child?"

Contrary to the majority's strained analysis in this case, one need look no further than the language of § 20-7-50 to clearly discern legislative intent that the statute apply only to children in being. "Legal custody" is not a qualification applicable to a viable fetus. I simply disagree the legislature intended a statute entitled "Unlawful neglect of child or helpless person by legal custodian" to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking? Although the majority dismisses this issue as not before it, the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this "down-the-road" consequence in a case of this import is unrealistic. The majority insists that parents may already be held liable for drinking after a child is born. This is untrue, however, without some further act on the part of the parent. A parent who drinks and then hits her child or fails to come home may be guilty of criminal neglect. The mere fact of drinking, however, does not constitute neglect of a child in being.

The majority attempts to support an over inclusive construction of the child abuse and neglect statute by citing

other legal protections extended equally to a viable fetus and a child in being. The only law, however, that specifically regulates the conduct of a mother toward her unborn child is our abortion statute under which a viable fetus is in fact treated differently from a child in being.[1]

The majority argues for equal treatment of viable fetuses and children, yet its construction of the statute resuits in even greater inequities. If the statute applies only when a fetus is "viable," a pregnant woman can use cocaine for the first twenty-four weeks[2] of her pregnancy, the most dangerous period for the fetus, and be immune from prosecution under the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman now faces up to ten years in prison for investing drugs during pregnancy but can have an illegal abortion and receive only two-year sentence for killing her viable fetus.[3]

Because I disagree with the conclusion § 20-7-50 includes a viable fetus, I would affirm the grant of post-conviction relief.

[1] A woman may have a legal abortion of a viable fetus if necessary to preserve her health, S.C. Code Ann. § 44-41-20(c) (1985), while, of course, she may not justify the death of a child in being on this ground.

[2] Viability is presumed to occur no sooner than the twenty-fourth week of pregnancy. S.C. Code Ann. § 44-41-10(l) (1985).

[3] S.C. Code Ann. § 44-41-80(b) (1985).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cornelia Whitner, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Pickens County
Frank Eppes, Trial Judge
Larry R. Patterson,
Post-Conviction Judge

Opinion No. 24468
Heard May 31, 1996 - Filed July 15, 1996

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Attorney General Teresa Nesbitt Cosby, Staff Attorney David K. Avant, all of Columbia, for Petitioner.

C. Rauch Wise, of Wise & Tunstall, of Greenwood; Lynn M. Paltrow and Lisa S. Tankoos, both of The Center for Reproductive Law & Policy, of New York, for Respondent.

Stephen P. Williams, of Columbia, for Amici Curiae South Carolina Medical Association; American Medical Association & American College of Obstetricians & Gynecologists.

Robert H. Hood and Joseph C. Wilson, IV, both of Hood Law Firm, of Charleston, for Amici Curiae City of Charleston, South Carolina; Board of Trustees and various employees of the MUSC; Reuben Greenberg, Chief of Charleston Police Department; Charles Molony Condon, former Ninth Circuit Solicitor; and David Schwacke, current Ninth Circuit Solicitor.

Susan Dunn, of Charleston; Carol E. Tracy and Susan Frietsche, of Philadelphia, PA, for Amici Curiae The American Public Health Association; American Medical Women's Association; American Nurses Association; Coalition on Addiction, Pregnancy and Parenting; Drug Policy Foundation; National Council on Alcoholism and Drug Dependence; National Perinatal Association; Planned Parenthood of Central South Carolina; National Women's Health Network; NOW Legal Defense and Education Fund; South Carolina Chapter of The National Organization for Women; South Carolina Nurses Association; and The Women's Law Project and Operation PAR.

John D. (Jay) Elliott, of Columbia, for Amicus Curiae The Alliance for South Carolina's Children.

TOAL, A.J.: This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's

Code (the Code), S.C. Code Ann. § 20-7-50 (1985).[1] We hold the word "child" as used in that statute includes viable fetuses.

FACTS

On April 20, 1992, Cornelia Whitner (Whitner) pled guilty to criminal child neglect, S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of Whitner's ingestion of crack cocaine during the third trimester of her pregnancy. The circuit court judge sentenced Whitner to eight years in prison. Whitner did not appeal her conviction.

Thereafter, Whitner filed a petition for Post Conviction Relief (PCR), pleading the circuit court's lack of subject matter jurisdiction to accept her guilty plea as well as ineffective assistance of counsel. Her claim of ineffective assistance of counsel was based upon her lawyer's failure to advise her the statute under which she was being prosecuted might not apply to prenatal drug use. The petition was granted on both grounds. The State appeals.

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[1] Section 20-7-50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. *See* S.C. Code Ann. § 20-7-50 (Supp. 1994). We cite the earlier version of the statute in this opinion because Whitner was prosecuted under that version. The language in the amended section relating to the actions constituting the crime is identical to the language under which Whitner was prosecuted. In other words, although the characterization of and penalty for the crime have changed, the acts constituting the crime have not.

LAW\ANALYSIS

A. Subject Matter Jurisdiction

The State first argues the PCR court erred in finding the sentencing circuit court lacked subject matter jurisdiction to accept Whitner's guilty plea. We agree.

Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. *See Williams v. State*, 306 S.C. 89, 410 S.E.2d 563 (1991). For the sentencing court to have had subject matter jurisdiction to accept Whitner's plea, criminal child neglect under section 20-7-50 would have to include an expectant mother's use of crack cocaine after the fetus is viable.[2] All other issues are ancillary to this jurisdictional issue.

S.C. Code Ann. § 20-7-50 (1985) provides:

> Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child*

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[2] The State argues we need not reach the issue of the applicability of section 20-7-50 to viable fetuses, because the indictment alleged a violation on the date of the child's birth. We disagree. The basis for the indictment was the presence of cocaine in the newborn infant. Unless Whitner gave her child cocaine after the child's birth, which no one has alleged, the behavior giving rise to the abuse and neglect charge necessarily occurred before the child was born. Moreover, the record of Whitner's original hearing and the hearing on her petition for Post Conviction Relief make clear the conviction was for her neglecting her child by ingesting crack cocaine during pregnancy. For that reason, we must determine whether section 20-7-50 applies to such behavior.

> or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).

The State contends this section encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*.

Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey*, __ S.C.__, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 410 S.E.2d 245 (1991). Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *See Berkebile v. Outen*, __ S.C.__, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541-42 (1953).

South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died

four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, *inter alia*, a fetus is thought to have no separate being apart from the mother.

We found such a reason for exclusion from recovery "unsound, illogical and unjust," and concluded there was "no medical or other basis" for the "assumed identity" of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: "We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother *is a person*." *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

Four years later, in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted *Hall* as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

> Since a viable child is a *person before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant, to the injury of the child . . . .
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> * * *
>
> *Once the concept of the unborn, viable child as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.

Id. at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

More recently, we held the word "person" as used in a *criminal* statute includes viable fetuses. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina's murder statute, S.C. Code Ann. § 16-3-10 (1976). The defendant in that case stabbed his wife, who was nine months' pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency Caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

This Court disagreed. In a unanimous decision, we held it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward*, *supra*). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The policies enunciated in the Children's Code also support our plain meaning reading of "person." S.C. Code

Ann. § 20-7-20(C) (1985), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word "person" to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to *all* children who have need of services." S.C. Code Ann. § 20-7-20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.

Whitner advances several arguments against an interpretation of "person" as used in the Children's Code to include viable fetuses. We shall address each of Whitner's major arguments in turn.

Whitner's first argument concerns the number of bills introduced in the South Carolina General Assembly in the past five years addressing substance abuse by pregnant women. Some of these bills would have criminalized substance abuse by pregnant women;[3] others would have addressed the issue through mandatory reporting, treatment,

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[3] *See, e.g.*, S. 4032 (1993) (proposing making it a crime for a pregnant woman to ingest a controlled substance); H. 4486 (1994) (proposing amendment to section 20-7-50 to apply to actions of pregnant women).

or intervention by social service agencies.[4] Whitner suggests that the introduction of several bills touching the specific issue at hand evinces a belief by legislators that prior legislation had not addressed the issue. Whitner argues the introduction of the bills proves that section 20-7-50 was not intended to encompass abuse or neglect of a viable fetus.

We disagree with Whitner's conclusion about the significance of the proposed legislation. Generally, the legislature's subsequent acts "cast no light on the intent of the legislature which enacted the statute being construed." *Home Health Servs., Inc. v. DHEC*, 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989) (citations omitted). Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent. *E.g., State v. Blackmon*, 304 S.C. 270, 403

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[4] *See* S.1495 (1989-1990), reintroduced as S.75 (1990-1991) (requiring drug testing of newborns and to include within civil definition of neglect any newborn testing positive for controlled substance); S.1470 (1989-1990), reintroduced as S.79 (1991) (mandating reporting to DSS pregnant woman believed to have used controlled substance; providing for education and drug treatment); H. 3858 (1990-1991)(requiring reporting of pregnant woman believed to be using controlled substance and expanding civil definition of "abused child" to include newborn testing positive for illegal drugs); S. 986 (1991)(mandating drug testing on newborn infants, requiring reporting such infants as abused under civil abuse laws, and requiring reversible sterilization or implantation of birth control until mother completes drug treatment program); S. 155 (1992-1994) (permitting testing newborns for controlled substances and reporting such test results to DSS for limited purposes); S. 1256 (1992), reintroduced as S. 150 (1992-1993) (permitting referral to DHEC of families with children prenatally exposed to drugs and giving pregnant women priority in drug treatment programs).

S.E.2d 660 (1991). Here, we see no reason to look beyond the statutory language. *See Timmons v. South Carolina Tricentennial Comm'n, supra* (where statute's meaning can be determined from its language, no need to look beyond such language). Additionally, our existing case law strongly supports our conclusion about the meaning of the statute's language.

Whitner also argues an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature. Specifically, she claims if we interpret "child" to include viable fetuses, *every* action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute. For example, a woman might be prosecuted under section 20-7-50 for smoking or drinking during pregnancy. Whitner asserts these "absurd" results could not have been intended by the legislature and, therefore, the statute should not be construed to include viable fetuses.

We disagree for a number of reasons. First, the same arguments against the statute can be made whether or not the child has been born. After the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act -- consuming alcoholic beverages -- is itself legal. Obviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

Moreover, we need not address this potential parade of horribles advanced by Whitner. In *this* case, which is the only case we are called upon to decide here, certain facts are clear. Whitner admits to having ingested crack cocaine during the third trimester of her pregnancy, which caused her child to be born with cocaine in its system. Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. *See, e.g.*, Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985). There can be no question here Whitner endangered the life, health, and comfort of her child. We need not decide any cases other than the one before us.

We are well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes. *See, e.g., Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (1977); *State v. Carter*, 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992), *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.), *app. denied.*, 471 N.W.2d 619 (Mich. 1991); *Commonwealth v. Kemp*, 643 A.2d 705 (Pa. Super. Ct. 1994). Many of these cases were prosecuted under statutes forbidding delivery or distribution of illicit substances and depended on statutory construction of the terms "delivery" and "distribution." *See, e.g., Johnson v. State, supra*; *State v. Luster, supra*; *People v. Hardy, supra*. Obviously, such cases are inapplicable to the present situation. The cases concerning child endangerment

statutes or construing the terms "child" and "person" are also distinguishable, because the states in which these cases were decided have entirely different bodies of case law from South Carolina. For example, in *Commonwealth v. Welch*, the Kentucky Supreme Court specifically noted Kentucky law has not construed the word "person" in the criminal homicide statute to include a fetus (viable or not). *Welch*, 864 S.W.2d at 281. In *Reyes v. Superior Court*, the California Court of Appeals noted California law did not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes, and that it was thus improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. *Reyes*, 75 Cal. App. 3d at 217.

Massachusetts, however, has a body of case law substantially similar to South Carolina's, yet a Massachusetts trial court has held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus. *See Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990).[5] Specifically, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured *in utero* who are not subsequently born alive. *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1 975). Similarly, Massachusetts law permits homicide prosecutions of third parties who kill viable fetuses. *See Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)(ruling a viable fetus is a person for purposes of vehicular homicide statute); *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989)(viable fetus is a person for purposes of common law crime of murder). Because of the similarity of the case law in Massachusetts to ours, the *Pellegrini* decision merits examination.

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[5] We note that *Pellegrini* was decided by a Massachusetts superior court. To date, no appellate court in Massachusetts has addressed this issue directly.

In *Pellegrini*, the Massachusetts Superior Court found that state's distribution statute does not apply to the distribution of an illegal substance to a viable fetus. The statute at issue forbade distribution of cocaine to persons under the age of eighteen. Rather than construing the word "distribution," however, the superior court found that a viable fetus is not a "person under the age of eighteen" within the meaning of the statute. *Pellegrini*, slip op. at 11. In so finding, the court had to distinguish *Lawrence* and *Cass*, *supra*, both of which held viable fetuses are "persons" for purposes of criminal laws in Massachusetts.

The Massachusetts trial court found *Lawrence* and *Cass* "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." *Pellegrini*, slip op. at 11. In other words, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents. Under this rationale, the viable fetus lacks rights of its own that deserve vindication. Whitner suggests we should interpret our decisions in *Hall*, *Fowler*, and *Horne* to accord rights to the viable fetus only when doing so protects the special parent-child relationship rather than any individual rights of the fetus or any State interest in potential life. We do not think *Hall*, *Fowler*, and *Horne* can be interpreted so narrowly.

If the *Pellegrini* decision accurately characterizes the rationale underlying *Mone*, *Lawrence*, and *Cass*, then the reasoning of those cases differs substantially from our reasoning in *Hall*, *Fowler*, and *Horne*, *supra*. First, *Hall*, *Fowler*, and *Horne* were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, *Horne* also rested on the *State's* -- not the mother's -- interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly

held that the states have a compelling interest in the life of a viable fetus. *See Roe v. Wade*, 410 U.S. 113, 165, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973); *see also Planned Parenthood v. Casey*, __ U.S. __, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). If, as Whitner suggests we should, we read *Horne* only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same aces. We decline to read *Horne* in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law -- protection of the viable fetus -- is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini*.

The dissent contends that our holding in this case is inconsistent with *Doe v. Clark*, __ S.C. __, 457 S.E.2d 336 (1995). Specifically, it suggests that *Doe v. Clark*, in which we construed another provision of the Children's Code, stands for the proposition that the definition of "child' in S.C. Code Ann. § 20-7-50 (1985) means a "child in being and not a fetus." Contrary to the dissent's characterization of that case, *Doe* turned on the specific language in the consent provisions of the Adoption Act, S.C. Code Ann. § 20-7-1690 and - 1700 (Law. Co-op Supp. 1994).

In *Doe*, Wylanda Clark, who was pregnant, signed a consent form allowing the Does to adopt the child upon its birth. After the child was born, Clark decided she wanted to keep the baby and attempted to argue that the consent she executed was void because it did not contain certain information required by statute. The trial judge held Clark's consent was valid. Clark appealed.

On appeal, we reversed the trial court. However, the basis for our reversal was not that "child" as defined in the Children's Code only includes born children, but that the adoption statutes contemplate that the natural mother's consent to the adoption must be given after the birth of the child to be adopted. *Doe*, __ S.C. at __, 457 S.E.2d at 337. Specifically, section 20-7-1700(A)(3) requires the consent form to contain the race, sex, and *date of birth* of the adoptee, as well as any names by which the adoptee has been known. Clearly, the date of birth requirement could not be fulfilled until after the birth of the child. Furthermore, section 20-7-1690, which specifies who must consent to an adoption, provides that consent is required of "the mother of a child *born* when the mother was not married." (emphasis added). Citing these sections as well as the Children's Code's definition of child, we concluded that a natural mother cannot consent to adoption until after the birth of her child. *Id.* We did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly.

Finally, the dissent implies that we have ignored the rule of lenity requiring us to resolve any ambiguities in a criminal statute in favor of the defendant. The dissent argues that "[a]t most, the majority only suggests that the term 'child' as used in § 20-7-50 is ambiguous," and that the ambiguity "is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide."

Plainly, the dissent misunderstands our opinion. First, we do not believe the statute is ambiguous and, therefore, the rule of lenity does not apply. Furthermore, our interpretation of the statute is based primarily on the plain meaning of the word "person" as contained *in the statute.* We need not go beyond that language. However, because our prior decisions in *Murphy*, *Fowler*, and *Horne* support our reading of the

statute, we have discussed the rationale underlying those holdings. We conclude that both statutory language and case law compel the conclusion we reach. We see no ambiguity.

B. Ineffective Assistance of Counsel

The State next argues the PCR court erred in holding Whitner received ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a PCR applicant must show (1) deficient performance by her attorney and (2) prejudice resulting therefrom. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice when challenging a guilty plea, the applicant must show that but for counsel's deficient performance, the applicant would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985). In this case, the basis for the ineffective assistance claim was the failure of Whitner's counsel to inform her section 20-7-50 did not apply to prenatal drug use. Whitner contends she would not have pled guilty if her lawyer had given her such advice.

Given our holding that section 20-7-50 *is* applicable to an expectant mother's illegal drug use after the fetus is viable, we cannot say Whitner's lawyer's failure to advise her of the statute's *inapplicability* constituted deficient performance. In fact, both the unambiguous language of the statute and this Court's prior case law justify counsel's belief the child neglect statute applied to Whitner's actions. Therefore, the PCR court erred in ruling Whitner received ineffective assistance of counsel.

C. Constitutional Issues

Respondent Whitner argues section 20-7-50 is unconstitutional as applied to an expectant mother's actions. However, *none* of these arguments were ever raised to the

PCR court. All the arguments before that court were based on the scope of section 20-7-50.[6] Moreover, the PCR judge's Final Order makes no mention of these constitutional arguments, and the Record does not reflect any motion under Rule 59(e), SCRCP, to amend or alter the judgment. Having failed to raise the issue below, Whitner cannot raise it before this Court. *E.g., Plyer v. State,* 309 S.C. 408, 424 S.E.2d 477 (1992)(issue not raised before PCR court will not be considered on appeal).

CONCLUSION

For the foregoing reasons, the decision of the PCR Court is **REVERSED**.

WALLER and BURNETT, JJ., concur. FINNEY, C.J., and MOORE, A.J., dissenting in separate opinions.

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[6] We were able to find only one instance in which counsel even arguably raised the constitutional issues argued here. During arguments before the PCR court, Whitner's counsel once commented:

> That gets to the other issues involved and whether or not it violates the right of privacy...but *I don't think we even have to get into that fully.*

ROA at 56 (emphasis added). We do not think this passing statement raises the constitutional issues. Even if it did, however, the PCR court's Final Order made no mention of the issues and Whitner's counsel failed to preserve them by moving under Rule 59(e), SCRCP, for a motion to alter or amend the judgment. *See, e.g., State v. Woodruff*, 300 S.C. 265, 387 S.E.2d 453 (1989)(issues not preserved below will not be considered on appeal).

FINNEY, C.J.: I respectfully dissent, and would affirm the grant of post-conviction relief to respondent Whitner.

The issue before the Court is whether a fetus is a "child" within the meaning of S.C. Code Ann. § 20-7-50 (1985), a statute which makes it a misdemeanor[1] for a "person having legal custody of any child or helpless person" to unlawfully neglect that child or helpless person. Since this is a penal statute, it is strictly construed against the State and in favor of respondent. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991).

The term child for purposes of § 20-7-50 is defined as a "person under the age of eighteen" unless a different meaning is required by the circumstances. S.C. Code Ann. § 20-7-30 (1) (1985). We have already held that this same definition found in another part of the Children's Code means a child in being and not a fetus. *Doe v. Clark*, __ S.C. __, 457 S.E.2d 336 (1995). It would be incongruous at best to hold the definition of "child" in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.

More importantly, it is apparent from a reading of the entire statute that the word child in § 20-7-50 means a child in being and not a fetus. *See Jackson v. Charleston County School District*, ___ S.C. ___, 447 S.E.2d 859 (1994) (when construing a statute, we do not view its terms in isolation, but rather in the context of the entire statute and its intended purpose). A plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, and not those which may harm fetuses. First, § 20-7-50 does not impose criminal liability on every person who neglects a child, but only on a person having **legal**

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[1] After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act No. 184, §55 (effective January 1, 1994).

custody of that child. The statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus. *See Stone v. State*,__ S.C. __, 443 S.E.2d 544 (1994)(statutes are construed so as to avoid absurd results). Second, § 20-7-50 refers to S. C. Code Ann. § 20-7490 (1985 and Supp. 1994) for the definition of neglect. Section 20-7-490 defines a neglected child as one harmed or threatened with harm, and further defines harm. §20-7-490(B), (C), and (D). The vast majority of acts which constitute statutory harm under § 20-7-490 are acts which can only be directed against a child, and not towards a fetus.[2] The reliance upon § 20-7-490 in § 20-7-50 is further evidence that the term child as used in the child neglect statute does not encompass a fetus. Read in context, and in light of the statutory purpose of protecting persons of **tender years**[3] it is clear that "child" as used in § 20-7-50 means a child in being. *Jackson v. Charleston County School District, supra.*

At most, the majority only suggests that the term "child" as used in § 20-7-50 is ambiguous. This suggestion of ambiguity is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide. Here, we deal with the Children's Code, and the meaning of language used in a criminal statute under that Code. We have already indicated that a child within the meaning of § 20-7-90(A)(1985), which

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[2] Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.

[3] *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982)(construing § 16-3-1030, recodified as § 20-7-50).

criminalizes non-support, must be one already born. *State v. Montgomery,* 246 S.C. 545, 144 S.E.2d 797 (1965)(indictment for violation of predecessor of § 20-7-90(A) fatally defective for failing to identify the child by description or date of birth); *see also Doe v. Clark, supra.* Even if these wrongful death, common law, and Children's Code decisions are sufficient to render the term child in § 20-7-50 ambiguous, it is axiomatic that the ambiguity must be resolved in respondent's favor. *State v. Blackmon, supra.*

I would affirm.

MOORE, A.J.: I concur with the dissent in this case but write separately to express my concerns with today's decision.

In my view, the failure of the legislature on eleven occasions to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance. This Court should not invade what is clearly the sole province of the legislative branch. At the very least, the legislature's failed attempts to enact a statute regulating a pregnant woman's conduct indicate the complexity of this issue. While the majority opinion is perhaps an argument for what the law *should* be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course rejected by every other court to address the issue.

As discussed in the Chief Justice's dissent, we are bound by the rules of statutory construction to strictly construe a criminal statute in favor of the defendant and resolve any ambiguity in her favor. *State v. Blackmon, supra.* I cannot accept the majority's assertion that the child abuse and neglect statute unambiguously includes a "viable fetus." If that is the case, then why is the majority compelled to go

to such great lengths to ascertain that a "viable fetus" is a "child?"

Contrary to the majority's strained analysis in this case, one need look no further than the language of § 20-7-50 to clearly discern legislative intent that the statute apply only to children in being. "Legal custody" is not a qualification applicable to a viable fetus. I simply disagree the legislature intended a statute entitled "Unlawful neglect of child or helpless person by legal custodian" to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to take vitamins and eat properly? Failure to quit smoking or drinking? Although the majority dismisses this issue as not before it, the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this "down-the-road" consequence in a case of this import is unrealistic.

The majority attempts to support an overinclusive construction of the child abuse and neglect statute by citing other legal protections extended equally to a viable fetus and a child in being. The only law, however, that specifically regulates the conduct of a mother toward her unborn child is our abortion statute under which a viable fetus is in fact treated differently from a child in being.[1]

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[1] A woman may have a legal abortion of a viable fetus if necessary to preserve her health, S.C. Code Ann. §44-41-20(c) (1985), while, of course, she may not justify the death of a child in being on this ground.

The majority argues for equal treatment of viable fetuses and children, yet its construction of the statute results in even greater inequities. If the statute applies only when a fetus is "viable," a pregnant woman can use cocaine for the first twenty-four weeks[2] of her pregnancy, the most dangerous period for the fetus, and be immune from prosecution under the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman, under the majority opinion, now faces up to ten years in prison for ingesting drugs during pregnancy but can have an illegal abortion and receive only two-year sentence for killing her viable fetus.[3]

Because I disagree with the conclusion § 20-7-50 includes a viable fetus, I would affirm the grant of post-conviction relief.

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[2] Viability is presumed to occur no sooner than the twenty-fourth week of pregnancy. S.C. Code Ann. §44-41-10(1) (1985).

[3] S.C. Code Ann. § 44-41-80(b) (1985).

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

COURT OF GENERAL SESSIONS
92-GS-39-670

STATE OF SOUTH CAROLINA :
:
-vs- : TRANSCRIPT OF
: RECORD
CORNELIA WHITNER :

MONDAY, APRIL 20, 1992

PICKENS, SOUTH CAROLINA

B E F O R E:

HONORABLE FRANK EPPES, JUDGE.

A P P E A R A N C E S:

MICHELLE NELSON, ESQUIRE
ATTORNEY FOR THE STATE

CHERYL AARON, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DIANNE A. JOSEPH

CIRCUIT COURT REPORTER

THE COURT: IS THIS A CRACK BABY?
DEFENDANT: YES, SIR.
THE COURT: WHY WOULDN'T YOU JUST TAKE A PISTOL AND PUT IT IN YOUR MOUTH AND BLOW YOUR HEAD OFF? YOU WOULDN'T DO THAT, WOULD YOU?
DEFENDANT: NO, SIR.
THE COURT: WELL, WHY ARE YOU FOOLING WITH CRACK COCAINE?
DEFENDANT: I NEED SOME HELP, YOUR HONOR.
THE COURT: HOW OLD ARE YOU?
DEFENDANT: 28.
THE COURT: HOW OLD?
DEFENDANT: 28.
THE COURT: YOU'RE GETTING TOO OLD TO BE FOOLING WITH THAT STUFF. HOW MANY BABIES YOU GOT?
DEFENDANT: I GOT THREE. THREE.
THE COURT: ARE ALL OF THEM CRACK BABIES?
DEFENDANT: HUH-UH.
THE COURT: DO YOU UNDERSTAND YOU CAN GET 10 YEARS FOR THAT?
DEFENDANT: YES.
THE COURT: YOU HAVE A RIGHT TO A TRIAL BY JURY. THE JURY MAY FIND YOU GUILTY, THEY MAY FIND YOU NOT GUILTY. YOU DO NOT HAVE TO TESTIFY. IF YOU DO NOT TESTIFY, I CHARGE THE JURY THEY COULDN'T HOLD THAT AGAINST YOU. DO YOU WANT TO WAIVE, FORFEIT, GIVE UP ALL YOUR CONSTITUTIONAL RIGHTS AND

PLEAD GUILTY?
DEFENDANT: YES.
THE COURT: ALL RIGHT. TELL ME ABOUT IT.
MS. NELSON: MAY IT PLEASE THE COURT. YOUR HONOR, ON FEBRUARY 2ND OF THIS YEAR MS. WHITNER GAVE BIRTH TO A MINOR CHILD, KEVIN SEAN (PHONETIC) WHITNER, AT THE EASLEY BAPTIST MEDICAL CENTER. THE BABY WAS TESTED AND TESTED POSITIVE FOR COCAINE.
I WOULD ADVISE THE COURT THAT MS. WHITNER -- THAT THE CHILD IS NOW IN THE CUSTODY OF -- THAT MS. WHITNER IS NOT IN CUSTODY OF ANY OF HER CHILDREN. AND SHE WAS BEFORE YOUR HONOR IN DECEMBER ON A DIFFERENT CHILD NEGLECT CHARGE.
THE COURT: YOU ON PROBATION NOW?
MS. NELSON: YEAH.
THE COURT: HAVE YOU SERVED THE WARRANT ON HER?
MS. AARON: YOUR HONOR, I DON'T BELIEVE THIS WOULD CONSTITUTE A VIOLATION.
THE COURT: SEE WHEN SHE WAS PLACED ON PROBATION. THIS HAPPENED IN FEBRUARY.
MS. NELSON: YOUR HONOR, SHE WAS PUT ON PROBATION ON DECEMBER 18. SHE GOT 10 YEARS SUSPENDED ON 5 YEARS PROBATION, 500 HOURS COMMUNITY SERVICE.
THE COURT: THIS WOULD BE A VIOLATION.
DEFENDANT: UM ---
THE COURT: MA'AM?

DEFENDANT: WELL. TAMARA (PHONETIC) TOLD ME THAT SINCE IT HAPPENED BEFORE THEN -- BEFORE I GOT ON IT.

THE COURT: WELL, THIS -- IF THE BABY'S BORN ON -- THE BABY WAS BORN AFTER THAT, YOU WERE PLACED ON PROBATION?

DEFENDANT: YEAH. BUT, SEE, I WAS ---

THE COURT: WHAT? TELL ME.

DEFENDANT: SHE SAID -- SHE TOLD ME THAT IT ---

THE COURT: WHO SAID THAT?

DEFENDANT: TAMARA, MY PROBATION OFFICER.

THE COURT: WHO?

DEFENDANT: TAMARA.

MS. AARON: TAMARA FLANNIGAN (PHONETIC), HER PROBATION AGENT.

THE COURT: WELL, YOU UNDERSTAND YOU CAN GET 10 YEARS FOR THIS?

DEFENDANT: YES.

THE COURT: YOU HAVE A RIGHT TO A TRIAL BY JURY. A JURY MAY FIND YOU GUILTY, MAY FIND YOU NOT GUILTY. YOU DO NOT HAVE TO TESTIFY. THE STATE IS REQUIRED TO PROVE YOU GUILTY BEYOND A REASONABLE DOUBT. IF YOU DO NOT TESTIFY, I CHARGE THE JURY THEY COULDN'T HOLD THAT AGAINST YOU. AND YOU STILL WANT TO PLEAD GUILTY?

DEFENDANT: YES.

THE COURT: ALL RIGHT. TELL ME ABOUT HER, MS. AARON.

MS. AARON: MAY IT PLEASE THE COURT, YOUR HONOR.

CORNELIA IS 28 YEARS OLD. SHE DID HAVE AN ADDICTION PROBLEM.
SHE INDICATES THAT SHE WAS-CLEAN BEFORE THE BIRTH OF HER
CHILD, AND ALSO, SHE HAS BEEN IN DRUG COUNSELING SINCE AND
WANTS TO CONTINUE ---
DEFENDANT: A TREATMENT CENTER.
MS. AARON: SHE WOULD LIKE TO GO TO AN IN-PATIENT
TREATMENT CENTER. THE BABY WHICH SHE HAD IN FEBRUARY IS IN
GOOD HEALTH NOW. AND D.S.S. OR ANOTHER INDIVIDUAL HAS CUSTODY
OF THE REST OF HER CHILDREN. SHE WOULD LIKE TO GET HERSELF
STRAIGHTENED OUT. SHE INDICATES THAT SHE HAS NOT USED DRUGS
SINCE BEFORE THIS CHILD WAS BORN IN FEBRUARY, BUT SHE BELIEVES
THAT SHE NEEDS SOME IN-PATIENT HELP TO REMAIN THAT WAY.
THE COURT: 670. I THINK I'LL JUST LET HER GO TO JAIL.
THE SENTENCE OF THE COURT IS YOU BE CONFINED TO THE STATE
BOARD OF CORRECTIONS FOR A PERIOD OF 8 YEARS. ATTEND A.T.U.
YOU ALL CHECK ON THAT AND SEE WHETHER THAT'S A VIOLATION
OF HER PROBATION.
--- END OF TRANSCRIPT OF RECORD ---

I, THE UNDERSIGNED DIANNE A. JOSEPH, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR PICKENS COUNTY, SOUTH CAROLINA, ON THE 20TH DAY OF APRIL 1992.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JULY 9, 1993

s./Dianne E. Joseph
COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

Cornelia Whitner, 186151

Petitioner,

-vs-

State of South Carolina,

Respondent.

APPLICATION FOR POST-CONVICTION RELIEF
93-CP-39-347

1. Place of Detention:
The Petitioner is presently detained with the South Carolina Department of Corrections, Leath Correctional Institution, Greenwood, SC

2. Name and location of Court which imposed sentence:
Pickens County General Sessions Court, Pickens, SC

3. The indictment number or numbers upon which and the offense for which sentence was imposed:
92-GS-39-670 for a violation of South Carolina Code of Laws § 20-7-50

4. The date upon which sentence was imposed and the term of the sentence:
The petitioner was sentenced on April 20, 1992 to a term of eight years imprisonment.

5. The finding of guilty was made after a plea of guilty.

6. Did you appeal from the judgment of conviction or the imposition of sentence?
No.

7. If you answered "yes" to (6), list
   a. the name of each Court to which you appealed:
      i. Not Applicable
   b. the result in each such Court to which you appealed:
      i. Not Applicable
   c. the date if each such result
      i. Not Applicable
   d. if known, citations of any written opinion or orders entered pursuant to such result:
      i. Not Applicable

8. If you answered "no" to (6), state your reasons for not so appealing:
   a. I was not informed of my right to appeal.
   b. I not believe that a plea of guilty could be appealed.

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   a. I entered a plea of guilty to a crime that does not exist in South Carolina.
   b. The indictment and facts upon which I plead guilty does not allege a crime. To allow a conviction upon an indictment and facts that do not allege a crime is a violation of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America.
   c. I was denied effective assistance of counsel in that I plead guilty to crime that does not exist.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):
    a. I was indicted for child abuse for giving birth to a child who had cocaine in his system. I am now informed that the statute under which I was indicted and plead guilty does not apply to a fetus.
    b. A person can only be imprisoned for a crime. As the facts under which I entered a plea of guilty do not constitute a crime, I am being unlawfully held in prison.
    c. My attorney failed to adequately research the question as to whether taking drugs while pregnant was a violation of South Carolina Code of Laws § 20-7-50.

11. Prior to this application have you filed with respect to this conviction:
    a. any petition in a State Court under South Carolina law?
    No
    b. any petitions in State or Federal Courts for habeas corpus or post conviction relief? No
    c. any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified? No
    d. any other petitions, motions or applications in this or any other Court? No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application. Question 11 was answered in the negative.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State, or Federal, in any petition, motion or application which you have filed? No.

14. If you answered "yes" to (13) identify:
    a. which grounds have been presented:
        i. Question 13 was answered in the negative.
    b. the proceeding in which each ground was raised:
        i. Question 13 was answered in the negative.

15. If any ground set fourth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reason why such ground has not previously been presented:
    a. No ground raised in this application has previously been presented to any court on my behalf. My attorney did not raise the issue at the time of my plea. I did not have sufficient legal knowledge to raise the issues.

16. Were you represented by an attorney at any time during the course of:
    a. your arraignment and plea? Yes
    b. your trial, if any? No
    c. your sentencing? Yes
    d. your appeal, if any, from the judgment or conviction or the imposition of sentence? No
    e. preparation, presentation, or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:
    a. the name and address of each attorney who represented you
        i. Cheryl Aaron
           Pickens, SC

ii. C. Rauch Wise
408 Main Street
Greenwood, SC 29646

b. the proceeding at which each attorney represented you.

I. Cheryl Aaron represented me at the time of my plea.

ii. C. Rauch Wise represented me in the preparation of this application for post conviction relief.

18. State clearly the relief you seek in filing this application.
I seek to have my guilty plea set aside and for a ruling that South Carolina Code of Laws § 20-7-50 does not apply to a fetus.

19. Are you under sentence from any other court that you have not challenged? No.

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF GREENWOOD)

I, Cornelia Whitner, being duly sworn upon my oath, deposes and says that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Sworn to and Subscribed
before me this 10 day of
May, 1993

s./Cornelia Whitner
CORNELIA WHITNER

s./C. Rauch Wise
Notary Public for South Carolina
My commission expires: 2/1/2000

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Cornelia Whitner, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Sworn to and Subscribed
before me this 10 day of
May, 1993

s./Cornelia Whitner
CORNELIA WHITNER

s./C. Rauch Wise
Notary Public for South Carolina
My commission expires: 2/1/2000

s./Oliver A. Nealy
Clerk of Court

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF PICKENS	) PLEAS
	) 93-CP-39-347
	)
Cornelia Whitner, 186161,	)
	)
Applicant,	) **ORDER**
	)
vs.	)
	)
State of South Carolina,	)
	)
Respondent.	)
----------	)

Cornelia Whitner brought this action for post-conviction relief (PCR) on the grounds that the court lacked subject matter jurisdiction to accept her guilty plea and for ineffective assistance of counsel. The application is granted, and the sentence is vacated.

The Applicant was indicted in April, 1992, under S.C. Code Ann. § 20-7-50 (1985) for unlawful neglect of a child because she allegedly used crack cocaine while she was pregnant. She was not charged with any other crime. Being represented by court-appointed counsel, Cheryl Aaron, Ms. Whitner pled guilty to the charge and was sentenced to eight years in prison. Ms. Whitner did not appeal her conviction, but has brought this application for post-conviction relief.

I.

A PCR application may properly be brought on grounds that a trial court lacked subject matter jurisdiction to accept a guilty plea where the plea was premised upon an offense that does not exist. *Williams v. State*, 410 S.E.2d 563, 564 (S.C. 1991). The Applicant, who admitted to having a

drug addiction problem, pled guilty under a child abuse and neglect statute, which provides:

> Any person having the legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide ... the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and, shall be punished within the discretion of the circuit court.

S.C. Code Ann. § 20-7-50 (1986).

Ms. Whitner claims in her application that this statute does not apply to her since the only conduct that may have harmed her child was her use of crack cocaine while the child was still a fetus.

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the Legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.

State v. Blackmon, 403 S.E.2d 660, 662 (S.C. 1991) (citations omitted); *accord, e.g., Morgan v. S.C. Dept, of Social Services,* 313 S.E.2d 350, 352 (S.C.App. 1984) (words should be given their ordinary and popular significance); *State v. Sims,* 405 S.E.2d 377, 385 (S.C. 1991).

> Penal statutes are construed strictly against the State and in favor of the defendant. *State v. Cutler,* 274 S.C. 376, 264 S.E.2d 420 (1980). As was aptly summarized by Chief Justice Marshall in *United States v. Wiltberger,* (18 U.S.) 5 Wheaton 76, 95-96, 5 L.Ed. 37, 42 (1820): The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the Judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. . . The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so.

Williams v. State, supra, at 564.

Against those well-established principles, the state's argument must fail. The statute states that it applies to a "child or helpless person." The Children's Code, which includes this statute, defines "child" as "a person under the age of eighteen." S.C. Code Ann. § 20-70-490 (1985). The plain, ordinary, and popular meaning of "a person under the age of eighteen" does not include a fetus. In interpreting a statute in similar circumstances, the Ohio Supreme Court held that "the child did not become a 'child' within the

contemplation of the statute until she was born," *State v. Gray,* 584 N.E.2d 710, 711 (Ohio 1992). *See also State v. Luster,* 419 S.E.2d 32, 34 (Ga.App. 1992) (interpreting "person" not to include a fetus). For this statute to apply, the Legislature would simply have to add the word "fetus" or "unborn child" to § 20-7-50. As the statute currently stands, it would be difficult, consistent with our accepted rules of statutory construction, to interpret this statute in a civil context to apply to a fetus. However, given our well-established rule that criminal statutes must be strictly construed against the State, it is not difficult to conclude that the crime for which Ms. Whitner was charged does not exist in South Carolina.

No appellate court in our nation has interpreted its child abuse laws to apply to a woman who takes illegal drugs during pregnancy. *E.g., State v. Gray, supra; State v. Gethers,* 585 So.2d 1140 (Fla.App. 4 Dist. 1991). Prosecutors in other states have similarly tried to convict pregnant woman who used illegal drugs by charging them under drug distribution statutes, arguing that she passed the drugs through the umbilical cord. However, this approach has also failed. *E.g., State v. Luster, supra,; Johnson v. State,* 602 So.2d 1288 (Fla. 1992).

It is not for this court to decide whether taking illegal drugs during pregnancy should make a mother liable for child abuse. Whether including fetuses within our child abuse laws would deter pregnant women from seeking medical treatment or would, on the contrary, deter them from taking illegal drugs in the first place is an important question. But it is just the type of question that the Legislature must decide. "The Legislature is [the] appropriate forum to discuss public policy, as well as the complexity of prenatal drug use, its affect upon an infant, and its criminalization." *People v. Hardy,* 469 N.W.2d 50, 53 (Mich.App. 1991). Accordingly, this court has no choice but to interpret this statute not to apply to a fetus and dismiss the case.

II.

The Applicant further claims that her counsel was ineffective during the guilty plea proceeding. "To establish a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and but for this deficiency petitioner would not have pled guilty. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984); *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed 203 (1985)." *Murdaugh v. State,* 426 S.E.2d 740, 742 (S.C. 1992); *accord Thornes v. State* 426 S.E.2d 764, 765 (S.C. 1993). *Strickland* requires that the performance of counsel be evaluated against the background of prevailing professional norms." *Jordan v. State* 374 S.E.2d 683, 684 (S.C. 1988) (citation omitted).

At the time Ms. Whitner pled guilty, no circuit court in this state had ruled on whether § 20-7-50 applied to a woman who used drugs during her pregnancy. However, as discussed *supra,* other states had ruled that similar statutes did not apply to these facts. Further, counsel was undoubtedly aware of our court's rules of statutory construction -- especially the requirement to construe penal statutes against the State. Yet, counsel did not challenge the application of § 20-7-50 to these facts. It is probable that Ms. Whitner would not have pled guilty had she been made aware that her indictment stood on shaky legal ground. Therefore, the Applicant received ineffective assistance of counsel. *See Murdaugh v. State, supra* (counsel ineffective during guilty plea where he failed to distinguish between a counterfeit and imitation drug offense).

For the reasons stated above, the trial court lacked subject matter jurisdiction to accept the Applicant's plea since the crime for which she pled guilty did not exist, and the Applicant received ineffective assistance of counsel. Although the Applicant would have only been entitled to a new trial based on ineffective assistance of counsel, she is entitled to

have the sentence vacated since the court lacked jurisdiction. Accordingly, the sentence is vacated and the case is dismissed.

AND IT IS SO ORDERED.

s./Larry R. Patterson
Larry R. Patterson
Presiding Judge
Thirteen Judicial Circuit

November 22, 1993

Pickens, South Carolina

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

November 19, 1997

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Lynn M. Paltrow, Esquire
Center for Reproductive Law
120 Wall Street, 18th Floor
New York, N.Y. 10005

Re: Whitner, Cornelia v. State

Dear Counsel:

The Court has issued the following Order on your petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s./Jean H. Toal A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

"I would grant Rehearing.

s./Ernest A. Finney, Jr. C.J.

s./James E. Moore A. J.

November 17, 1997."

The remittitur in this matter is today being forwarded to the Clerk of Court for Pickens County.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

November 20, 1997

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Lisa S. Tankoos, Esquire
Lynn M. Paltrow, Esquire
120 Wall Street, 18th Floor
New York, NY 10005

Re: Whitner, Cornelia v. State

Dear Counsel:

Please be advised that this Court will not take any action on the Petition to Allow Petitioner to Remain on Bond that was filed in this office on August 6, 1996.

By copy of this letter we are advising all interested parties of this action.

Very truly yours,

CLERK

CND, Jr./dmh

cc: Attorney General Charles Molony Condon
Deputy Attorney General John W. McIntosh

Assistant Attorney General David K. Avant
Carol E. Tracy, Esquire
John D. Elliott, Esquire

Cornelia Whitner v. State
Page Two
November 20, 1997

cc: Robert H. Hood, Esquire
Joseph c. Wilson, IV, Esquire
Stephen Phillip Williams, Esquire
Susan Frietsche, Esquire
Susan King Dunn, Esquire

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF
)	GENERAL SESSIONS
COUNTY OF ANDERSON)	92-GS-04-01
)	
THE STATE,)	
)	
VS.)	
)	
MALISSA ANN CRAWLEY,)	
)	
DEFENDANT.)	

GUILTY PLEA BEFORE THE HONORABLE TOM J. ERVIN, ESQUIRE, PRESIDING JUDGE CIRCUIT COURT JUDGE, AT THE ANDERSON COUNTY COURTHOUSE, ANDERSON, SOUTH CAROLINA, ON JANUARY 6, 1992.

APPEARANCES:
DRUANNE WHITE, ESQUIRE
ASSISTANT SOLICITOR

ROBERT GAMBLE, ESQUIRE
ATTORNEY FOR THE DEFENDANT

SUSAN AHEARN-HAWKINS, CVR
CIRCUIT COURT REPORTER

THE COURT: MS. CRAWLEY, WOULD YOU RAISE YOUR RIGHT HAND, PLEASE.

(MALISSA ANN CRAWLEY, IS FIRST DULY SWORN.)

THE COURT: MALISSA ANN CRAWLEY IS CHARGED IN THE INDICTMENT WITH UNLAWFUL NEGLECT OF A CHILD.

MRS. WHITE, HAVE THERE BEEN ANY NEGOTIATIONS IN THIS CASE?

MRS. WHITE: YES SIR, YOUR HONOR.

THE COURT: GO AHEAD AND STATE THEM

MRS. WHITE: WE HAVE A RECOMMENDED SENTENCE OF FIVE YEARS SUSPENDED ON FIVE YEARS PROBATION WITH COMPLIANCE WITH ANY FAMILY COURT TREATMENT PLANS, RANDOM DRUG TESTING, AND GO TO ADAC OR SOME OTHER FACILITY SUCH AS THAT TO GET HELP WITH DRUGS.

THE COURT: MR. GAMBLE, YOU REPRESENT MS. CRAWLEY?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED THAT RECOMMENDATION TO HER?

MR. GAMBLE: YES SIR. I'VE GONE OVER THAT WITH HER.

THE COURT: HOW DOES SHE INDICATE SHE WISHES TO PLEAD?

MR. GAMBLE: GUILTY, YOUR HONOR.

THE COURT: AND YOU'VE EXPLAINED TO HER THAT IF

SHE DOES PLEAD GUILTY SHE GIVES UP HER RIGHTS, INCLUDING HER RIGHT TO A JURY TRIAL?

MR. GAMBLE: YES SIR.

THE COURT: DO YOU BELIEVE SHE UNDERSTANDS ALL HER RIGHTS AND THE PENALTIES SHE COULD RECEIVE?

MR. GAMBLE: I DO, YOUR HONOR.

THE COURT: DO YOU AGREE WITH HER DECISION TO PLEAD GUILTY?

MR. GAMBLE: YES SIR, I DO.

EXAMINATION OF MALISSA ANN CRAWLEY BY THE COURT:

Q MS. CRAWLEY, HOW OLD ARE YOU?

A THIRTY (30).

Q HOW FAR DID YOU GO IN SCHOOL

A 12TH GRADE.

Q ARE YOU UNDER THE INFLUENCE OF ANY ALCOHOL OR DRUGS TODAY?

A NO SIR.

Q ARE YOU SATISFIED WITH THE WAY IN WHICH YOUR ATTORNEY, MR. GAMBLE, HAS REPRESENTED YOU IN THIS MATTER

A YES SIR.

Q DO YOU WANT A JURY TRIAL?

A NO SIR.

Q YOU'RE PLEADING GUILTY BECAUSE YOU ARE GUILTY?

A YES SIR.

Q NO ONE'S THREATENED YOU TO PLEAD GUILTY?
A NO SIR.
Q DO YOU UNDERSTAND IF YOU VIOLATE PROBATION YOU COULD SERVE UP TO FIVE YEARS?
A YES SIR.
MRS. WHITE: JUDGE, THIS HAS NOT BEEN TO THE GRAND JURY.
Q. ARE YOU WISHING TO WAIVE YOUR RIGHT TO HAVE THIS SENT TO THE GRAND JURY?
A YES SIR.
Q AT THAT TIME THE GRAND JURY COULD NO BILL THE CASE WHICH COULD END THE MATTER, BUT YOU GIVE UP THAT RIGHT IF YOU WAIVE OR GIVE UP PRESENTMENT. DID YOU UNDERSTAND THAT?
A YES SIR.
Q DO YOU UNDERSTAND THAT THE STATE WOULD HAVE THE BURDEN OF PROVING YOUR GUILT AT TRIAL BEYOND A REASONABLE DOUBT, THAT YOU COULD TESTIFY IN YOUR OWN BEHALF, THAT YOU COULD SUBPOENA WITNESSES IN YOUR OWN DEFENSE, CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST YOU -- AND DON'T EVEN HAVE TO TESTIFY? DO YOU UNDERSTAND ALL THAT?
A YES SIR.
Q YOU STILL WANT TO PLEAD GUILTY?
A YES SIR.

THE COURT: I FIND YOUR DECISION TO PLEAD GUILTY AND WAIVE PRESENTMENT IS FREELY, VOLUNTARILY AND INTELLIGENTLY MADE, ALL UPON THE ADVICE AND COUNSEL OF A COMPETENT ATTORNEY WITH WHOM YOU'RE SATISFIED AND YOUR PLEA IS ACCEPTED. THE RECOMMENDATIONS ARE ALSO ACCEPTED.

MR. GAMBLE, IS FAMILY COURT CURRENTLY SUPERVISING THIS MATTER?

MR. GAMBLE: FAMILY COURT IS INVOLVED IN THE MATTER, YOUR HONOR, SO I'M NOT SURE WHAT'S --

MS. CRAWLEY: THE 9TH.

MR. GAMBLE: HUH?

MS. CRAWLEY: IT'LL BE ON THE 9TH.

MR. GAMBLE: THE HEARING'S COMING UP ON THE 9TH AND IT'LL -- I CAN PREDICT THAT IT'LL GO THE USUAL WAY THESE GO. SHE'LL BE REQUIRED TO HAVE FAMILY COUNSELING AND DRUG COUNSELING AND --

MRS. WHITE: THIS IS ONE, YOUR HONOR, WHERE SHE AND THE BABY TESTED POSITIVE FOR COCAINE RIGHT AFTER THE BABY'S BIRTH AND I THINK THEY NORMALLY JUST ORDER THEM INTO THE SAME TYPE OF THINGS THAT WE'RE TALKING ABOUT, COUNSELING AND DRUG TREATMENT AND SO FORTH.

MR. GAMBLE: MALISSA'S NOW LIVING WITH HER MOTHER OVER ON BEECHWOOD AVENUE HERE IN ANDERSON AND IS WORKING WITH ADAC ALREADY. SHE HAS WORKED AT RYOBI

AND NOW HAS THREE CHILDREN SO IT'S GOING TO BE DIFFICULT FOR HER TO WORK TOO.

THE COURT: SHE HAS NO PRIOR CONVICTION RECORD?

MRS. WHITE: JUDGE, SHE HAS A PRIOR POSSESSION OF MARIJUANA AND DRIVING UNDER THE INFLUENCE FROM 1982.

THE COURT: MS. CRAWLEY, IF I FOLLOW THESE RECOMMENDATIONS DO YOU UNDERSTAND THAT YOU WILL HAVE TO SUCCESSFULLY COMPLETE ANY COUNSELING AS RECOMMENDED FOR SUBSTANCE ABUSE? IF YOU VIOLATE THAT YOU COULD SERVE TIME. DID YOU UNDERSTAND THAT?

MS. CRAWLEY: YES SIR.

THE COURT: I'M GOING TO SENTENCE YOU AS FOLLOWS: FIVE YEARS: FIVE YEARS SUSPENDED ON FIVE YEARS PROBATION -- SPECIAL CONDITIONS OF FIVE YEARS PROBATION YOU WILL BE REQUIRED TO SUCCESSFULLY COMPLETE ANY COUNSELINGS RECOMMENDED FOR SUBSTANCE ABUSE, COMPLY WITH ANY FAMILY COURT ORDERS AND ALSO BE RANDOMLY DRUG TESTED IN THE DISCRETION OF YOUR PROBATION AGENT. COSTS AND ASSESSMENTS AND SUPERVISION FEES ARE WAIVED AND EXEMPT.

DOES MY SENTENCE COMPLY WITH THE NEGOTIATIONS

MRS. WHITE?

MRS. WHITE: YES SIR.

MR. GAMBLE: YES SIR.

THE COURT: THANK YOU.

CERTIFICATE OF REPORTER

I, SUSAN AHEARN-HAWKINS, CVR, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD IN THE CAPTIONED CASE, TO THE BEST OF MY SKILL AND ABILITY, RELATIVE TO APPEAL, IN THE CRIMINAL COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, ON JANUARY 6, 1992.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

s./Susan Ahearn-Hawkins

DATED: October 7, 1994

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
	) PLEAS
COUNTY OF ANDERSON	)
	) Petition for
Malissa Ann Crawley	) Writ of
	) Habeas Corpus
Petitioner,	) 94-CP-04-1280
	)
-vs-	)
	)
Parker Evatt, Commissioner	)
of the South Carolina	)
Department of Corrections,	)
	)
Respondent.	)

The petitioner, Malissa Ann Crawley, alleges and would show to the Court as follows:

1. The petitioner is presently incarcerated with the Leath Correctional Institution of the South Carolina Department of Corrections.

2. The respondent is the Commissioner for the South Carolina Department of Corrections as the petitioner is presently being held within the South Carolina Department of Corrections.

3. On January 6, 1992 the petitioner plead guilty to a charge of Unlawful Neglect of a Child. The facts giving rise to the charge are that the petitioner allegedly took cocaine or crack cocaine while she was pregnant. At the time of her plea the trial judge placed her on probation.

4. On August 5, 1994 the petitioner had her probation revoked and the trial judge sentenced her to five years imprisonment.

5. The petitioner believes that she is being held unlawfully due to the fact that the act to which she plead guilty is not a crime in the State of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act that she is alleged to have committed, is not a crime within the State of South Carolina, she is being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

6. The petitioner requests that this court issue its Writ of Habeas Corpus requiring the defendant to produce the petitioner before the court and to show why the petitioner should not be released from confinement.

WHEREFORE, the petitioner prays that this court issue its Writ of Habeas Corpus requiring the respondent to produce the petitioner before the court and show why the petitioner should not be released from confinement and for such other and further relief as the court may deem just and proper.

September 25, 1994 s./C. Rauch Wise

C. RAUCH WISE
Wise & Tunstall
408 Main Street
Greenwood, SC 29646
(803) 229-5010
S.C. Bar No. 006188

Attorney for Petitioner

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF ANDERSON	)	COMMON PLEAS
	)	
Malissa Ann Crawley	)	
	)	
Petitioner,	)	
	)	
-vs-	)	
	)	94-CP-04-1280
Parker Evatt, Commissioner of the South Carolina Department of Corrections,	)	
	)	
Respondent.	)	

The petitioner, Malissa Ann Crawley, filed her Habeas Corpus Petition alleging that she plead guilty to a crime that does not exist in South Carolina. She contends she is being held unlawfully in violation of the due process clause of Article I, §3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America. She plead to a violation of S.C. Code § 20-7-50, the child abuse or neglect statute.[1]

Prior to the hearing the parties stipulated to certain facts and introduced exhibits. On January 6, 1992 the

---

[1] The statute provides: "any person having legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-50, the proper care and attention for such child or helpless person, so that the life, health, or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the court.

petitioner pled to a child of child neglect arising out of her giving birth to a child who tested positive for cocaine. On August 5, 1994 the court revoked her probation and sentenced her to five years imprisonment after she was charged with violating her probation. She is presently being held on that charge. The respondent does not contest the authority of the court to grant relief under the South Carolina habeas corpus statute. The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina. If she has, the use of the habeas corpus statute is certainly appropriate. *Butler v. State,* 302 S.C. 466, 397 S.E.2d 87 (1990).

The issue involved in this case is identical to several other cases that have arisen in this state. At present the South Carolina Supreme Court has agreed to hear one case that will resolve this case and all other pending cases. The court has reviewed the briefs filed on behalf of both parties filed with the South Carolina Supreme Court. As this case will be controlled by that decision, and all other circuit court that have addressed the issue have resolved the issue in favor of the petitioner, this court feels that it must also grant the relief requested.

The Court by its order does not condone the action of the petitioner in taking drugs while pregnant. The conditions imposed by the court in her appeal bond order hopefully will help the petitioner in her drug abuse problem. The court also recognizes the fact that the state cannot give back to the petitioner any time she may serve while the issue makes its way through the courts. The petitioner can, however, always give the time back to the state in the event this case is reversed.

WHEREFORE, it is hereby order adjudged and decreed that the guilt plea and conviction of the petitioner is hereby set aside. The indictment for a violation of S.C. Code § 20-7-60 is hereby dismissed.

10/17/1994

s./Frank Eppes
FRANK EPPES
Presiding Judge
Anderson County

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Malissa Anne Crawley, Respondent,

v.

Parker Evatt,
Commissioner of the
South Carolina
Department of
Corrections, Appellant.

Appeal From Anderson County
Frank Eppes, Judge

Memorandum Opinion No. 97-MO-117
Submitted December 18, 1996 -
Filed December 1, 1997

REVERSED

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa Knox, and Assistant Attorney General G. Robert Deloach, III, all of Columbia, for appellant.

C. Rauch Wise, of Greenwood, and Lynn M. Paltrow, of New York, New York, for respondent.

PER CURIAM: The State has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate respondent's conviction for unlawful neglect of a child. *Whitner v. State,* Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997)(Davis Adv. Sh. No. 30 at 27); S.C. Code Ann. § 20-7-50 (Supp. 1995).

REVERSED.

s./Jean H. Toal A.J.

s./John H. Waller, Jr. A.J.

s./E.C. Burnett, III A.J.

We adhere to our dissenting opinions in *Whitner v. State,* Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997)(Davis Adv. Sh. No. 30 at 27) and would affirm.

s./Ernest A. Finney, Jr. C.J.

s./James E. Moore A. J.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 8, 1998

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Re: Crawley, Malissa v. Parker Evatt, et al.

Dear Mr. Wise:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s./ Jean H. Toal A.J.

s./ John H. Waller, Jr. A.J.

s./ E.C. Burnett, III A.J.

I would grant Rehearing.

s./ Ernest A. Finney, Jr. C.J.

s./ James E. Moore A. J.

January 8, 1998."

The remittitur in this matter is today being forwarded to the Clerk of Court for Anderson County.

Very truly yours,

CLERK

CND, Jr./djp

C. Rauch Wise, Esq.
January 8, 1998
Page 2

cc: Attorney General Charles M. Condon
Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Teresa Knox
Assistant Attorney General G. Robert DeLoach, III
Lynn M. Paltrow, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Honorable Frank Epps, Judge

Case No. 97-MO-117

Malissa Ann Crawley,.....Respondent

v.

Parker Evatt,
Commissioner of the South Carolina

Department of
Corrections,.....Appellant

PETITION TO REMAIN ON BOND

The Respondent, Malissa Ann Crawley hereby petitions the Court as follows:

1. Malissa Ann Crawley requests that she be allowed to remain free on bond pending a Petition for Cert to the United States Supreme Court in her case.

2. She was placed on probation on January 6, 1992. Her probation was revoked on July 22, 1994 due to the fact that she got in a fight with her boyfriend and plead guilty to criminal domestic violence for the City of Anderson on July 15, 1994. At the probation revocation hearing, all five

years of her sentence was revoked (See Record on Appeal at 30).

3. Malissa Ann Crawley has maintained a stable home environment since her release on bond in 1994. She has had no violations on any of the conditions of her bond, nor has she been arrested since her release from jail pending this appeal. The attached affidavit of Sherman Lomax attests to her character.

4. Due to the important national issues involved in this appeal and the case of *State v. Whitner,* it is likely that the Supreme Court will hear these cases and make a final ruling.

Wherefore, the Respondent, Malissa Ann Crawley hereby requests that the Court issue its order allowing her to remain free on bond pending a Petition for Writ of Cert to the United States Supreme Court and any final disposition on the Petition for Cert.

December 18 , 1997

s./C. Rauch Wise

C. Rauch Wise
Wise & Tunstall
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Lynn Paltrow
45 West 10th Street
Apt. 3-F
New York, NY 10011
Attorney for Respondent

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT**
COUNTY OF ANDERSON)

PERSONALLY appeared before me Sherman Lomax, who after being duly sworn, deposes and says that:

1. He is a residence of Anderson County and has known Malissa Crawley for since 1988.

2. While he was employed, Malissa Crawley would clean house for him. He was forced to retire because of kidney failure. Earlier this year he had a kidney transplant. While recovering from the kidney transplant, Malissa Crawley has been helping him three days a week as he is unable to clean or maintain his house.

3. During the time he has known Malissa and during the time she has been helping him, he has found her to be an honest and dependable person. On occasions, Malissa has been in his house while he is away. He has always trusted her even when he is not present in the house.

4. He also knows her three children. They are frequently with her while she cleans his house. She has a good relationship with her children. All of her children appear healthy and happy.

SWORN to and Subscribed before me this 18 day of December, 1997

s./Sherman Lomax
SHERMAN LOMAX

s./C. Rauch Wise (L.S.)
Notary Public for South Carolina
My Commission expires:_____

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 22, 1998

C. Rauch Wise, Esquire
Wise & Tunstall
305 Main St.
Greenwood, SC 29646

Re: Crawley, Malissa v. Parker Evatt, et al.
94-CP-04-1280

Dear Mr. Wise:

The Court has refused your Petition to Remain on Bond in the above referenced matter in the following Order:

"Petition to remain on bond denied.

s./ Jean H. Toal A.J.

s./ John W. Waller, Jr. A.J.

s./ E.C. Burnett, III A.J.

We would Grant.

s./ Ernest A. Finney, Jr. C.J.

s./ James E. Moore A. J.

January 22, 1998."

By copy of this letter, all interested parties are advised of the Court's action in this matter.

C. Rauch Wise, Esquire
January 22, 1998
Page 2

Very truly yours,

CLERK

CND, Jr./djp

cc: Assistant Attorney General G. Robert DeLoach, III
Lynn M. Paltrow, Esquire
The Honorable Linda J. DeShields

South Carolina State Law,
S.C. Code Ann.
§ 20-7-50 (1985)

Any person having legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in section 20-7-490, the proper care and attention for such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

South Carolina State Law,
S.C. Code Ann.
§ 20-7-50 (1997)

§ 20-7-50. Unlawful conduct towards child.

(A) It is unlawful for a person who has charge or custody of a child, who is the parent or guardian of a child, or who is responsible for the care and support of a child to:

(1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

(2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or

(3) wilfully abandon the child.

(B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

Supreme Court, U.S.
FILED
APR 20 1998
CLERK

No. 97-1562

In The
Supreme Court of the United States
October Term, 1997

CORNELIA WHITNER, ... *Petitioner*,
vs.
STATE OF SOUTH CAROLINA, ... *Respondent*.

MALISSA ANN CRAWLEY, ... *Petitioner*,
vs.
MICHAEL MOORE, as Director of the South Carolina Department of Corrections, ... *Respondent*.

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

* DONALD J. ZELENKA
Assistant Deputy Attorney General and Counsel of Record

DAVID K. AVANT
Assistant Deputy Attorney General

G. ROBERT DeLOACH, III
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3970

Attorneys for the Respondents

PETITIONERS' QUESTION PRESENTED

Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendment's requirement of due process notice and its prohibition against vague criminal statutes?

RESPONDENTS' COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review Petitioner Crawley's claims that the Respondents violated her constitutional rights, where the sole issue preserved for review concerned a question of state law?

2. Do the various interpretations of child abuse and drug abuse laws by the several states justify certiorari review, where those decisions turned on interpretations of state law rather than federal constitutional grounds?

3. Do the Petitioners' convictions satisfy due process requirements, where previous decisions of the state supreme court gave adequate notice that a viable fetus was a person protected by the unlawful neglect statute?

4. Does the potential prosecution for other unspecified conduct require certiorari review, where the statute clearly proscribes the Petitioners' conduct, and the burden of proof minimizes the danger of unwarranted applications of the statute?

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No. 97-1562

In The

Supreme Court of the United States

October Term, 1997

CORNELIA WHITNER, ... Petitioner,

vs.

STATE OF SOUTH CAROLINA, ... Respondent.

MALISSA ANN CRAWLEY, ... Petitioner,

vs.

MICHAEL MOORE, as Director of the South Carolina Department of Corrections, ... Respondent

---

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents submit that this Court should deny and dismiss the petition to review the judgments of the South Carolina Supreme Court.

CITATIONS TO OPINIONS BELOW

The South Carolina Supreme Court's opinion in Petitioner Whitner's case is dated October 27, 1997, and

reported at ___ S.C. ___, 492 S.E.2d 777 (1997).[1] The state supreme court denied the petition for rehearing from that decision on November 19, 1997.

The state supreme court issued an unpublished opinion in Petitioner Crawley's case on December 1, 1997. *Malissa Ann Crawley v. Parker Evatt*, Op. No. 97-MO-117 (S.C. Sup. Ct. filed Dec. 1, 1997). *See* PET. APP. at 89a-90a. The justices denied the petition for rehearing from that decision on January 8, 1998.

JURISDICTION

The Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

1. The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

[1] The South Carolina Supreme Court issued its original opinion on July 15, 1996. *See* Petitioner's Appendix ["PET. APP."] at 28a. The state supreme court granted Petitioner Whitner's petition for rehearing from that decision, and issued its amended opinion on October 27, 1997.

state deprive any person of life, liberty, or property, without due process of law....

2. S.C. CODE ANN. § 20-7-30(1) (1985), which states:

> When used in this chapter and unless otherwise defined or the specific context indicates otherwise:... "Child" means a person under the age of eighteen.

3. S.C. CODE ANN. § 20-7-50 (1985), which stated:

> Any person having the legal custody of any child or helpless person, who shall, without legal excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

STATEMENT OF THE CASE

A. *PROCEDURAL HISTORY.*

(1) *Petitioner Whitner's Case.*

On February 6, 1992, the City of Easley, South Carolina arrested Petitioner Whitner for a violation of S.C.

Code Ann. § 20-7-50 (1985)[2] styled "unlawful neglect of a child." The Pickens County Grand Jury indicted Petitioner Whitner on April 7, 1992 for the same offense, and she pled guilty to "unlawful neglect of a child" on April 20, 1992. The Honorable Frank Eppes then sentenced Petitioner Whitner to eight years imprisonment. No objections were made to the charge or jurisdiction of the court, and Petitioner Whitner did not appeal her conviction or sentence.

On May 10, 1993, Petitioner Whitner filed a state post-conviction relief application. The Honorable Larry R. Patterson held a hearing on November 1, 1993, and issued an order vacating the convictions on November 22, 1993.

The State appealed Judge Patterson's order. Following briefing and oral argument, the South Carolina Supreme Court reversed the granting of post-conviction relief on July 15, 1996. The state supreme court later granted Petitioner Whitner's petition for rehearing and issued an amended opinion on October 27, 1997. The state supreme court denied rehearing from that opinion on November 19, 1997.

(2) *Petitioner Crawley's Case.*

On November 29, 1991, the City of Anderson, South Carolina arrested Petitioner Crawley for a violation of S.C. CODE ANN. § 20-7-50 (1985) styled "unlawful neglect of a child." Petitioner Crawley waived grand jury presentment and pled guilty as charged on January 6, 1992. The Honorable Tom J. Ervin then sentenced Petitioner Crawley to five years imprisonment, suspended during five years

---

[2] The State charged the Petitioners under this version of the statute. The South Carolina General Assembly designated the crime a felony in 1993, and omitted the reference to "helpless persons" in 1996.

probation. She did not appeal her conviction or sentence.

On August 5, 1994, Judge Frank Eppes revoked Petitioner Crawley's probation and reinstated the active sentence based upon her July 15, 1994 conviction for criminal domestic violence. She did not appeal her revocation.

On September 25, 1994, Petitioner Crawley filed a state petition for writ of habeas corpus. The Honorable H. Dean Hall granted the writ on September 30, 1994, and set a hearing on the merits for October 17, 1994. At the conclusion of the merits hearing, Judge Frank Eppes issued a formal written order vacating Petitioner Crawley's conviction and sentence.

The State appealed Judge Eppes' order. On December 1, 1997, the state supreme court reversed the granting of state habeas relief, and reinstated Petitioner Crawley's conviction and sentence. The state supreme court denied her petition for rehearing on January 8, 1998. On February 27, 1998, Chief Justice Rehnquist denied Petitioner Crawley's request to remain on bond during the pendency of her appeal to this Court.

B. *STATEMENT OF RELEVANT FACTS.*

(1) *Petitioner Whitner's Case.*

Petitioner Whitner gave birth to a son, Kevin Sean, at the Easley Baptist Medical Center on February 2, 1992. The hospital tested the victim's blood, which showed the presence of the illegal substance of cocaine in his bloodstream.

(2) *Petitioner Crawley's Case.*

Petitioner Crawley gave birth to a son, Antwon Lorenzo, at Anderson Memorial Hospital on November 9, 1991. Both Petitioner Crawley and the victim tested positive for the presence of the illegal substance of cocaine in the bloodstream. Petitioner Crawley later admitted to the arresting officer that she unlawfully used cocaine during her pregnancy.

HOW THE QUESTIONS WERE RAISED BELOW

A. *PETITIONER WHITNER'S CASE.*

Petitioner Whitner's post-conviction relief application alleged that the State was holding her in custody unlawfully because:

(1) [She] entered a plea of guilty to a crime that does not exist in South Carolina...

> [She] was indicted for child abuse for giving birth to a child who had cocaine in his system. [She is] now informed that the statute under which [she] was indicted and plead guilty does not apply to a fetus.... PET. APP. at 58a-59a;

(2) The indictment and facts upon which [she] plead guilty does not allege a crime. To allow a conviction upon an indictment and facts that do not allege a crime is a violation of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth

> Amendment to the Constitution of the United States of America...
>
> A person can only be imprisoned for a crime. As to the facts under which I entered a plea of guilty do not constitute a crime, I am being unlawfully held in prison.... PET. APP. at 58a-59a.

(3) [She] was denied effective assistance of counsel in that I plead guilty to a crime that does not exist...

> [Her] attorney failed to adequately research the question as to whether taking drugs while pregnant was a violation of South Carolina Code of Laws § 20-7-50. PET. APP. at 58a-59a.

On November 22, 1993, Judge Patterson ruled that the sentencing court lacked subject matter jurisdiction to accept Petitioner Whitner's plea because "the crime for which [she] was charged does not exist in South Carolina." PET. APP. at 67a. Judge Patterson further ruled that plea counsel was ineffective because she "did not challenge application of § 20-7-50 to these facts." PET. APP. at 68a.

On writ of certiorari, the Supreme Court of South Carolina reversed the granting of post-conviction relief. The supreme court ruled that a viable fetus was a "person" under state law and entitled to protection under the unlawful neglect statute. *Cornelia Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. filed July 15, 1996) ("Whitner I"), *reproduced* in PET. APP. at 28a-35a.

On petition for rehearing, the state supreme court addressed Petitioner Whitner's federal constitutional claims.[3] The amended opinion rejected her argument that she lacked notice that the statute proscribed prenatal exposure to cocaine. *Whitner v. State*, ___ S.C. ___, 492 S.E.2d 777, 784-85 (1997) ("Whitner II"). The state supreme court then rejected her argument that the interpretation of the statute was void for vagueness.[4] *Id.*, 492 S.E.2d at 785.

B. *PETITIONER CRAWLEY'S CASE.*

Petitioner Crawley's state habeas corpus petition alleged that her confinement was unlawful for the following reason:

> The Petitioner believes that she is being held unlawfully due to the fact that the act to which she pled guilty is not a crime in the State of South Carolina. As a result, the trial court did not have jurisdiction to either accept her plea or to revoke her probation. As the charge against her, based upon the act she is alleged to have committed, is not a crime within the State of South Carolina, she is

---

[3] The state supreme court initially refused to consider these claims because Judge Patterson's order did not address the issues. *See* PET. APP. at 43a-44a; PET. APP. at 64a-69a.

[4] The state supreme court also rejected Petitioner Whitner's argument that the statute as applied violated her right to privacy. Id., 492 S.E.2d at 785-86. The Petitioners now state that the statute may implicate this right and others, but "this Court need not reach these issues in this case..." in determining whether to review the judgments below. *Petition for a Writ of Certiorari* ["PET."] pp. 28-29. Accordingly, the Petitioners have waived these arguments for certiorari review by this Court.

> being held in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America. PET. APP. at 85a.

In vacating the conviction, Judge Eppes noted that the Petitioner "contends she is being held unlawfully in violation of the due process clause...." PET. APP. at 86a. However, in addressing the merits of the petition, Judge Eppes held that "The sole question for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina." PET. APP. at 87a. Judge Eppes held that since "all other circuit court [sic] that have addressed the issue have resolved the issue in favor of the petitioner, this court feels that it must also grant the relief requested." PET. APP. at 87a.

On direct appeal, the Supreme Court of South Carolina allowed Petitioner Crawley to hold the time limits for filing her initial brief in abeyance while the decision in Petitioner Whitner's case was pending. After the state supreme court issued *Whitner* I, Petitioner Crawley filed a brief raising a number of constitutional issues, but avoiding the jurisdictional questions. On reply, the State argued that the federal constitutional claims were procedurally barred because neither the habeas petition nor Judge Eppes' order addressed these arguments.

After reviewing the record and appellate briefs, the Supreme Court of South Carolina decided the case without oral argument. The December 1, 1997 order simply states:

> The State has filed an appeal following the grant of respondent's petition for a writ of habeas corpus. We reverse the grant of habeas corpus and reinstate respondent's

conviction for unlawful neglect of a child. *Whitner v. State*, Op. No. 24468 (S.C. Sup. Ct. Refiled October 27, 1997) (Davis Adv. Sh. No. 30 at 27); S.C. CODE ANN. § 20-7-50 (Supp. 1995). PET. APP. at 90a.

REASONS FOR DENYING THE WRIT

A. There is no conflict among the states concerning the application of child abuse laws to viable fetuses because the cases from other jurisdictions turn upon an interpretation of legislative intent.

The Petitioners urge this Court to grant certiorari review because the South Carolina Supreme Court's interpretation of state law "directly conflicts with the decisions of its sister state courts." PET. pp. 12-13. This statement is not only misleading, but misrepresents the basis for the other decisions which prohibited prosecutions for prenatal abuse of a fetus.[5]

Three of the reported cases cited by the Petitioners concerned whether the use of drugs by a pregnant woman

[5] Based upon Petitioner Crawley's procedural default set forth in Respondents' Question 1 and argument D, arguments (A), (B) and (C) properly apply to Petitioner Whitner. However, if this Court determines that Petitioner Crawley is properly before it, then the arguments on the merits also apply to her constitutional claims and should not be deemed waived by the Respondents.

constituted a "delivery" to the viable fetus under those states' drug laws. *State v. Luster*, 204 Ga.App. 156, 419 S.E.2d 32 (1992); *People v. Hardy*, 188 Mich.App. 305, 469 N.W.2d 50 (1991); *Johnson v. State*, 602 So.2d 1288 (Fla. 1992). A quartet of state appellate courts concluded that the legislature did not intend their child abuse statutes to protect viable fetuses from prenatal exposure to drugs. However, nothing prevented lawmakers from doing so. *State v. Gray*, 62 Ohio St.3d 514, 516, 584 N.E.2d 710, 711 (1992); *State v. Dunn*, 82 Wash.App. 122, 128-29, 916 P.2d 952, 955 (1996); *Sheriff v. Encoe*, 110 Nev. 1317, 1321-22, 885 P.2d 596, 598 (1994); *Reinesto v. Superior Court*, 182 Ariz. 190, 192-93, 894 P.2d 733, 735-36 (Ct. App. 1995). Unlike South Carolina, two of the cited jurisdictions do not extend their homicide laws to protect a viable fetus, thereby precluding a similar extension to child abuse laws. *See Commonwealth v. Welch*, 864 S.W.2d 280, 281 (Ky. 1993); *Reyes v. Superior Court*, 75 Cal.App.3d 214, 217, 141 Cal.Rptr. 912 (1977). Finally, Texas has construed its child abuse law and held that it did not criminalize an injury which did not manifest itself until after the child was born. *State v. Collins*, 890 S.W.2d 893 (Tex. Ct. App. 1994). Like Kentucky and California, Texas penal law "has specifically limited the application of [its] penal laws to conduct committed against a human being who has been born and is alive." *Id.*, 890 S.W.2d at 897-98.

A plain reading of the reported decisions shows the other appellate courts based their rulings on an interpretation of state law and legislative intent. Importantly, none of these decisions categorically rejected or prohibited the legislature's power to criminalize the conduct for which the

Petitioners were prosecuted.[6] Instead, the courts concluded that the legislature did not intend the result sought by prosecutors under state law.

The South Carolina Supreme Court has reached the opposite conclusion regarding the legislative intent of this state's unlawful neglect statute.[7] The correctness of the state supreme court's interpretation of the statute cannot be reviewed in this Court. "We are, of course, bound to accept the interpretation of [South Carolina] law by the highest court of the State." *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).[8] Conversely, the other jurisdictions have interpreted their child abuse and drug laws as a matter of state law. If the other states choose not to prosecute under their respective laws, those decisions do not create a federal constitutional issue. *Cf. Martin v. Ohio*, 480 U.S. 228, 236 (1987) [Although majority of states did not require proof of self-

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[6] Those state courts addressing the issues of notice and vagueness did so because they concluded that prior state law did not support the interpretation urged by prosecutors. As shown *infra* in Argument B, the Petitioners had ample notice that their conduct was encompassed by this state's unlawful neglect statute.

[7] The Petitioners heavily rely upon past legislative history as an indication of the General Assembly's intent. PET. pp. 9-10. It is noteworthy that, in the two years following *Whitner* I, the legislature has not amended the statute to correct the state supreme court's alleged misinterpretation.

[8] The Petitioners have argued that the State's policy "will endanger both fetal and maternal health by frightening women away from prenatal and other needed care." PET. p. 10. This argument concerns the propriety of the punishment, and is properly a legislative policy question rather than a judicial concern. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

defense by a preponderance of the evidence, the states imposing that requirement did not violate due process].

The issue whether the Constitution allows South Carolina to prosecute the Petitioners for their violation of state law is a separate and distinct inquiry. Therefore, since there is no conflict between the states in the application of **federal** constitutional law, this Court should not grant certiorari review on this basis.

B. The Petitioners' convictions satisfy due process requirements because the previous decisions of the state supreme court gave them adequate notice that a viable fetus was protected by the unlawful neglect statute.

The Petitioners assert they could not have foreseen that the reference to a "child" in the unlawful neglect statute included an unborn, viable fetus. Accordingly, they conclude that they had no notice that the statute prohibited their ingestion of cocaine while pregnant. PET. pp. 17-20. These arguments have no merit. The prior decisions of the state supreme court gave the Petitioners ample notice that a viable fetus was a protected "person" under state civil and criminal law. Therefore, they were on notice that the unlawful neglect statute encompassed the conduct for which they were prosecuted.

The Respondent first notes that both Petitioners pled guilty. The voluntariness of their guilty plea is not the

subject of this petition for review.[9] Accordingly, the Petitioners have waived any claim that they lacked notice their conduct was prohibited by section 20-7-50. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ["[A] guilty plea is an admission of all the elements of a formal criminal charge...]. However, even if this Court determines that the Petitioners' constitutional arguments are proper, certiorari review is not warranted.

This Court has held that the unforeseeable enlargement of a criminal statute deprives a defendant due process of law where she has no notice that her conduct was criminal. *See*, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964). When the statutory language is clarified by judicial interpretation, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432, 443 (1997). The central inquiry "is whether the statute, either standing alone or as construed, makes it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.*

This Court has recognized that a broadly worded statute may encompass specific conduct without violating due process notice requirements. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with

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[9] At the state post-conviction relief hearing, Petitioner Whitner alleged that her plea counsel was ineffective. The state supreme court reversed the granting of relief on this ground. *Whitner* II, *Id.*, 492 S.E.2d at 784. Petitioner Whitner has not renewed this issue on writ of certiorari to this Court.

obvious clarity to the specific conduct in question, even though 'the very action in question has [not] been held unlawful.'" *Lanier*, *Id.*, 117 S.Ct. at 1227, 137 L.Ed.2d at 446. Prior precedents of the state courts explaining the meaning of a statute are appropriate in determining whether the defendant had notice that her conduct was prohibited. *Cf. Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973). Accordingly, in determining whether the Petitioners had adequate notice that section 20-7-50 applied to their conduct, this Court should consider the case law relied upon by the state supreme court. *See Whitner* II, *Id.*, 492 S.E.2d at 779-80.

In 1960, the state supreme court first held that a viable fetus was a "person" under state law in *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). In that case, the defendant was the driver of a car which collided with a bus, causing his passenger to give birth prematurely. The child died four hours later. The record showed that the victim was a viable fetus.[10] As the administrator of the child's estate, the plaintiff brought a survival action for damages for the "pain and suffering" of the viable fetus. *Id.*, 236 S.C. at 259, 113 S.E.2d at 791.

On appeal, the defendant argued that a viable fetus was not a "person" within the purview of the survival statute[11] because a viable fetus was not a "separate being

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[10] This Court has ruled that a fetus is "viable" if "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

[11] 1952 S.C. Code § 10-209 then read as follows:

apart from the mother." *Whitner* II, *Id.*, 492 S.E.2d at 780 [Explaining *Hall*]. After construing the statute, Justice Oxner disagreed. Speaking for a unanimous court, Justice Oxner stated that precluding a survival action for prenatal injuries to a viable fetus was "unsound, illogical and unjust." *Hall*, 236 S.C. at 262, 113 S.E.2d at 793. The court concluded, "We have no difficulty in concluding that a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries." *Id.*, 236 S.C at 263, 113 S.E.2d at 793. Importantly, the opinion noted with approval that "the law recognizes the separate existence of an unborn child for the purpose of protecting his property rights **and to protect him against criminal conduct.**" (Emphasis added). *Id.*, 236 S.C. at 262, 113 S.E.2d at 793, *quoting Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953).

The state supreme court next addressed the rights of a viable fetus in the context of the wrongful death statute[12]

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to **the person** or to personal property shall survive both to and against the person or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or defunct or insolvent corporation, any law or rule to the contrary notwithstanding. (Emphasis added). *Now codified as* S.C. CODE ANN. § 15-5-90 (1977).

[12] The pertinent part of 1962 S.C. Code § 10-1951 then read:

> Whenever the death of a **person** shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not

in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964). In that case, an automobile accident killed a woman who was eight months pregnant. When the plaintiff filed suit on behalf of the deceased infant's estate, the defendant moved to dismiss because there was no allegation that "the infant 'was born alive and thereafter died as a result of the actions and injuries alleged and complained of.'" *Id.*, 244 S.C. at 611, 138 S.E.2d at 43. The state supreme court disagreed.

Applying *Hall*, Justice Brailsford concluded that the plain language of the wrongful death statute allowed an action on behalf of the estate of a viable fetus:

> **Since a viable child is a person before separation from the body of its mother** and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant, to the injury of the child, as would have entitled to child 'to maintain an action and recover damages in respect thereof... if death had not ensued.' By the very terms of the statute, this is the test of the right of an administrator to maintain an action for wrongful death. (Emphasis added). *Fowler*, 244 S.C. at 613, 138 S.E.2d at 45.

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ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death **of the person** injured.... (Emphasis added). *Now codified as* S.C. CODE ANN. § 15-51-10 (1977).

Accordingly, the unanimous court rejected that argument "that in the absence of a live birth, 'no rights vested, supporting either a cause of action, or the appointment of an administrator.'" *Id.*, 244 S.C. at 615, 138 S.E.2d at 45.

Consistent with *Hall* and *Fowler*, the state supreme court logically concluded that a viable fetus was protected by the criminal law of this state in *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984). In that case, the defendant stabbed his pregnant wife in the abdomen. During an emergency caesarean section operation, the unborn child died in the womb. The State charged the defendant with murder, and the jury convicted him of voluntary manslaughter.

On appeal, the state supreme court held that the language of the murder statute[13] allowed a prosecution for the unlawful killing of a viable fetus. Acting Justice Shaw noted that "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Horne*, 282 S.C. at 447, 319 S.E.2d at 704.

After reviewing those precedents, the state supreme court concluded that Petitioner Whitner had notice that her unborn, viable fetus was a "child" protected by section 20-7-50.[14] Under state law, "there is a basic presumption that

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[13] State law defines murder as "the killing of **any person** with malice aforethought, either express or implied." (Emphasis added). S.C. CODE ANN. § 16-3-10 (1985).

[14] The Petitioners state that the lower courts of this state have "rejected the interpretation recently propounded by the South Carolina Supreme Court, holding that such an interpretation is not consonant with the ordinary understanding of the term 'child.'" PET. pp. 19-20. Again, this statement is misleading. Obviously, a significant number of circuit

the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Whitner* II, Id., 492 S.E.2d at 779. As the state supreme court noted, state law defines "child" as "a **person** under the age of eighteen." S.C. Code Ann. § 20-7-30(1) (1985). *See Whitner* II, *Id.*, 492 S.E.2d at 779. Accordingly, although the legislature did not expressly state that a child in section 20-7-50 included a viable fetus, the ordinary meaning of "person" under state law brings a viable fetus under its purview. Therefore, based upon *Hall*, *Fowler* and *Horne*, the Petitioners were on notice that their conduct violated the statute.[15] *Whitner* II, *Id.*, 492 S.E.2d at 780.

This interpretation of the statute was fully with due process guarantees. Unlike the defendants charged in *Bouie*, the state supreme court's interpretation of the statute was fully consistent with prior precedents of this jurisdiction.[16]

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judges accepted the state supreme court's interpretation because they accepted the guilty pleas of these and other defendants charged under the statutes.

[15] The State did not prosecute the Petitioners for this crime based upon either their status as cocaine addicts or pregnant women. *See* PET. p. 21. Rather, based upon the prior precedents of the state supreme court, the Petitioners were charged because their illegal use of cocaine harmed viable fetuses with recognized civil rights in this state.

[16] The Petitioners claim they had no notice they could be prosecuted because the earlier state law cases involved third parties who harmed the viable fetus. PET. p. 21. This distinction is without substance. First, none of the precedents made the distinction urged by the Petitioners. Furthermore, this argument ignores the State's vital interest in the life and health of the viable fetus. *See Maher v. Roe*, 432 U.S. 464, 478 (1977). As this Court noted in *Roe v. Wade*:

See Id., 378 U.S. at 356 ["The interpretation given the statute by the South Carolina Supreme Court..., so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions"].

Furthermore, it is irrelevant that the unlawful neglect statute did not "enumerate" harm to a viable fetus as a specific criminal act. PET. p. 18, *quoting Bouie*. "When broad constitutional requirements have been 'made specific by... settled interpretations, willful violators 'certainly are in no position to say that they had no adequate notice that the would be visited by punishment....'" *Lanier*, *Id.*, 117 S.Ct. at 1225-26, 137 L.Ed.2d at 443. Additionally, "When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light." *Stone*, 414 U.S. at 22-23. As noted above, the previous precedents of the state supreme court gave the Petitioners ample notice that a viable fetus was a "person" and therefore a "child" under the unlawful neglect statute. Therefore, although section 20-7-50 did not proscribe fetal abuse in so many words, the application of the statute to this set of facts did not violate due process.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. *Id.*, 410 U.S. 113, 163-64 (1973).

The state supreme court's interpretation of section 20-7-50 is consistent with this recognition of the State's interest in protecting a viable fetus from harm. Therefore, the application of the statute is entirely consistent with prior precedents recognizing the civil rights of the unborn.

See Rose v. Locke, 423 U.S. 48, 51 (1975). Therefore, this Court should reject this ground for certiorari review.

C. The application of the statute to other conduct plainly hazardous to the health and safety of a viable fetus does not render it impermissibly vague as applied to Petitioner Whitner.

The Petitioners urge this Court to issue its writ of certiorari because *Whitner* II's construction of section 20-7-50 does not give notice of all possible parameters of criminal conduct. They assert that the statute could extend to other activities which are lawful, yet endanger the health or safety of a viable fetus. PET. pp. 22-26. They further argue that the interpretation of the statute is impermissibly vague because it gives the State unbridled discretion in determining which conduct to prosecute. PET. p. 28. These arguments do not warrant certiorari review.[17]

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[17] In an unrelated argument, the Petitioners argues that the statute itself violates due process because it defines simple negligence as the necessary mens rea for the offense. PET. pp.26-27. *See State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) [Mens rea for violation of section 20-7-50 is simple negligence]. The Petitioners have never raised this argument as a grounds for reversing her conviction in any forum in this state, and did not argue the issue in the state supreme court. Therefore, the issue is not properly before this Court. *Raley v. Ohio*, 360 U.S. 423, 434-35 (1959).

Even if this argument was properly before this Court, it must fail. "[T]his Court has never articulated a general constitutional doctrine of mens rea." *Powell v. Texas*, 392 U.S. 514, 535 (1968). Accordingly, the process of defining the mens rea of an offense is uniquely within the province of the state legislatures. *Id.* at 536. Furthermore, this Court has emphasized that it will read a requirement

The Petitioners argue that the state supreme court's interpretation of section 20-7-50 extends to "the entire universe of a pregnant woman's behavior[,]" including their failure to obtain proper prenatal care. PET. pp. 25-26. The state supreme court expressly declined to address this "parade of horribles" of possible applications of the statute. *Whitner* II, Id., 492 S.E.2d at 782. The sole question before the state supreme court and this Court is whether the State may prosecute this defendant for harm to a viable fetus from an admittedly unlawful act - the possession and use of crack cocaine. The Petitioners' argument effectively invites this Court "to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated." *Webster v. Reproductive Health Services*, 492 U.S. 490, 506 (1989), *quoting Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945).

This Court has emphasized that "Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-25 (1936). Likewise, "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Int'l Longshoremen's and Warehousemen's Union v. Boyd*,

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of criminal intent in a statute only where it is silent. *Staples v. United States*, 511 U.S. 600, 605-6 (1994). Accordingly, this Court will not construe a statute to allow a prosecution for conduct without purpose or knowledge, unless the legislature implicitly or explicitly intended that result. *Id.*, 511 U.S. at 606. In this case, well before the State charged the Petitioners for harming their unborn children, they were on notice that the mens rea of the offense was simple negligence. *Jenkins*, *Id.*

347 U.S. 222, 224 (1954). This Court should not review the a hypothetical application of the statute, when the Petitioners' cases comes squarely within its parameters.[18] "[T]his Court 'is not empowered to decide... abstract propositions, or to declare, for the government of future cases, principles or rules which cannot affect the result as to the thing in issue in the case before it.'" *Webster*, 492 U.S. at 507, *quoting Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900). Therefore, this Court should not issue its writ of certiorari to review potential prosecutions that may never occur.

Furthermore, "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). In this case, the Petitioners pled guilty and thereby admitted that they harmed their children when they used crack cocaine during their pregnancies. As noted above, the voluntariness of the guilty plea is not an issue before this Court. Therefore, the Petitioners lack standing to raise this argument. "[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not

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[18] Petitioner Whitner and potential amici dispute whether prenatal exposure to crack cocaine harms the developing or viable fetus. *See* PET. p. 20, n. 19. As the state supreme court noted, "Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child." *Whitner* II, *Id.*, 492 S.E.2d at 782 (citing medical authorities). Additionally, Petitioner Whitner's argument concerns causation and the State's burden of proof in a prosecution, not whether the State can prosecute her for unlawful neglect based upon admittedly illegal conduct. In any event, Petitioner Whitner pled guilty, and thereby waived any challenge to the sufficiency of the State's evidence.

give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *Parker v. Levy*,417 U.S. 733, 756 (1974). Accordingly, **"One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."** (Emphasis added). *Id.*

Finally, if other conduct harmful to the viable fetus comes within the ambit of section 20-7-50, there is no constitutional barrier to prosecutions for that conduct. *Roe v. Wade* clearly recognized the State's undeniable interest in protecting the health and safety of a viable fetus as a potential life in being. The requirement that the State prove each element of the offense beyond a reasonable doubt avoids any possible danger that a woman would be convicted for arguably innocent conduct. Under the facts of this case, nothing should prevent the State from prosecuting when a child is born suffering from drug withdrawal symptoms and the mother admits to using drugs during her pregnancy.

Under *Whitner* II, the burden falls squarely on the State to prove that the fetus was viable. Section 20-7-50 further requires proof of willful conduct or negligence, which contemplates a showing that the actor's conduct or omission was unreasonable.[19] This requirement also imposes the burden upon the State to prove that the potential harm to the viable fetus was foreseeable. *See Boyleston v. Southern Railway Co.*, 211 S.C. 232, 44 S.E.2d 537 (1947) ["Negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for injuries which, though possible, were wholly improbable"].

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[19] As a corollary to this requirement, the State must also prove that the mother knew or should have known that her fetus was viable at the time she exposed him or her to dangerous drugs.

Furthermore, the refusal to provide care must be legally inexcusable.[20]

Lastly, since the statute only punishes conduct for which the viable fetus "is endangered or likely to be endangered," the State must prove that the defendant's conduct was the proximate cause of any injuries. "The questions of causation, reasonable certainty, etc., which will arise in these cases are no different, in kind, from the ones which have arisen in thousands of other negligence cases decided in this State, in the past." *Hall*, 236 S.C. at 262, 113 S.E.2d at 793. Accordingly, the State's burden of proving negligence, proximate causation and harm to the fetus beyond a reasonable doubt minimizes the danger that a mother would be unjustly convicted. This Court should not grant the Petitioners' request for certiorari review of this issue.

D. Petitioner Crawley's failure to timely raise her federal constitutional claims has defaulted these issues for certiorari review in this Court.

Petitioner Crawley contends that she included her petition for writ of certiorari with Petitioner Whitner's case "because the two judgments raise identical questions...." PET. p. 1, n. 1. This contention is factually and legally incorrect because Petitioner Crawley defaulted any federal constitutional claims in the Supreme Court of South Carolina.

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[20] This requirement minimizes the danger of prosecution of pregnant women who undergo life saving medical treatment that may harm the viable fetus, such as chemotherapy.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies regardless of whether the state law ground is procedural or substantive. *Id.*, 501 U.S. at 729. Conversely, this Court lacks jurisdiction to consider a federal constitutional claim where the petitioner did not preserve or properly present the issue in the state court. *Wainwright v. Sikes*, 433 U.S. 72 (1977); *Teague v. Lane*, 489 U.S. 288 (1989); *Coleman*, 501 U.S. at 729-30.

As shown above, Petitioner Crawley's state habeas case only addressed the subject matter jurisdiction of the sentencing court. She claimed that section 20-7-50 did not apply to the conduct for which she pleaded guilty. The order vacating Petitioner Crawley's conviction only addresses the jurisdiction of the circuit court. None of the constitutional claims addressed in the present petition for writ of certiorari were raised, argued or ruled upon in Petitioner Crawley's state habeas proceeding. Accordingly, under South Carolina law, even if Petitioner Crawley attempted to raise these issues on direct review, she did not preserve her claims for consideration by the state supreme court. *See Evans v. Manning*, 217 S.C. 10, 59 S.E.2d 341, *cert. denied* 340 U.S. 851 (1950).[21]

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[21] In *Evans*, the petitioner received habeas corpus relief on the ground that the governor granted him a "leave of absence." On direct appeal, the petitioner raised an additional sustaining ground for habeas corpus relief. In reversing the order granting relief, the South Carolina Supreme Court refused to consider the additional sustaining ground "since it was not raised in the lower court." 217 S.C. at 16, 59 S.E.2d at 343.

This Court lacks jurisdiction to consider Petitioner Crawley's arguments unless the state supreme court's judgment appeared "to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion...." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this case, Judge Eppes' order states that Petitioner Crawley alleged her conviction was "in violation of the due process clause...." However, the order granting state habeas relief eliminated any possible ambiguity when Judge Eppes stated that "The **sole question** for the court is whether the petitioner pled guilty to a crime that does not exist in South Carolina." (Emphasis added). Accordingly, the order plainly rests upon state law grounds concerning the jurisdiction of the trial court.

Since Petitioner Crawley did not raise any federal constitutional claims in her state habeas petition, those issues were not properly before the state supreme court. *Evans*, *Id.* The memorandum opinion reinstating the convictions does not expressly state that the state supreme court considered the federal constitutional claims; it simply cites *Whitner* II and the statute. However, this Court should not presume that the state supreme court considered the merits of the federal constitutional issues or declined to apply its procedural bar.

Even without a plain statement that the state supreme court relied upon state law grounds or procedural default in its judgment, there is no presumption that it considered the claims raised in the present petition. *Cf. Ylst v. Nunnamaker*, 501 U.S. 797 (1991) [Where last reasoned opinion rested on or was interwoven with federal law, federal court will presume that subsequent unexplained order did not invoke procedural bar]. Both *Whitner* I and II addressed the state law jurisdictional issue which supported

the relief in Petitioner Crawley's habeas case. As noted above, the State expressly relied upon the Petitioner's procedural default in addressing her federal constitutional claims in the state supreme court. Accordingly, based upon Petitioner Crawley's procedural default, the state court could reverse the order granting collateral relief on state law grounds without reaching the merits of her federal constitutional claims. Therefore, this Court should not grant certiorari review on the dubious assumption that the state court considered the arguments in the present petition. As this Court has noted,

> In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the "most reasonable explanation" is that the state judgment rested on federal grounds. (c.o.). Yet [petitioner] would have the federal courts apply a conclusive presumption of no independent and adequate state grounds in every case in which a state prisoner presented his federal claims to a state court, regardless of whether it fairly appears that the state court addressed those claims. We cannot accept such a rule, for it would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. *Coleman*, 501 U.S. at 737-38.

Since Petitioner Crawley has not preserved her federal constitutional claims, and the judgment below rests upon adequate and independent state law grounds, this Court lacks subject matter jurisdiction to review her case. *Michigan v. Long*, *Id.*; *Coleman*, *Id.* Therefore, this Court

should dismiss Petitioner Crawley as a party to this petition for writ of certiorari.

CONCLUSION

For all of the foregoing reasons, this Court should decline discretionary review in this case.

Respectfully submitted,

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In The

Supreme Court of The United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MALISSA ANN CRAWLEY,

Petitioner,

v.

MICHAEL MOORE, AS DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Cornelia Whitner and Malissa Ann Crawley ("petitioners") respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of South Carolina in *Whitner v. State*, 328 S.C.1, 492 S.E.2d 777 (1997), and the subsequent decision in *Crawley v. Evatt*, relying on that decision.

SUMMARY OF THE ARGUMENT

The *Whitner* decision completely confounds this Court's Fourteenth Amendment jurisprudence, and squarely conflicts with the decisions of other state high courts, including those of Kentucky and Nevada, that have held that the due process guarantee of notice and its prohibition against vague criminal statutes preclude the use of child neglect statutes to punish women for their conduct during pregnancy. *See Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

Respondents the State of South Carolina and Michael Moore, as Director of the South Carolina Department of Corrections ("respondents"), have failed to demonstrate that the constitutional infirmities inherent in the new interpretation of § 20-7-50 are not susceptible to this Court's review. Contrary to their assertion, prior unrelated decisions of the South Carolina Supreme Court did not provide petitioners with the constitutionally mandated notice. Furthermore, by accepting the State's proposed construction, the *Whitner* court placed its imprimatur on a vague criminal statute which provides no guidance to the government officials responsible for its enforcement. Finally, there is no support for respondents' claim that petitioner Crawley is barred from participating in the case before this Court.

I. *WHITNER* HAS CREATED AN INTOLERABLE CONFLICT AMONG STATE HIGH COURTS

Respondents are incorrect in their assertion that no conflict exists between South Carolina and any other state that has addressed the question of whether a preexisting child neglect statute (or drug delivery statute) may be applied to pregnant women's conduct. *See* Respondents' Opposition to the Petition for Certiorari ("Opp.") at 10-13. Their argument in this regard relies solely on the misapprehension that no state court addressing this issue has construed federal constitutional law in the process of reaching its determination. *Id.*

In fact, the state supreme courts in *Encoe*, 110 Nev. at 1319, 885 P.2d at 598, and *Welch*, 864 S.W.2d at 283, explicitly held that the constraints of federal due process notice requirements prohibited them from reinterpreting their respective child neglect statutes and giving them an entirely new meaning. *See* Petition for Certiorari ("Pet.") at 13-15. Furthermore, both courts concluded that they could not reinterpret their statutes to reach the conduct of pregnant women because such a construction would render the laws unconstitutionally vague. As the *Encoe* court stressed:

> If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes.'... [which] could be construed as covering the full range of a pregnant woman's behavior -- a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.

110 Nev. at 1320, 885 P.2d at 598 (quoting *Welch*, 864 S.W.2d at 283). In contrast, the South Carolina Supreme Court expressly concluded that the Fourteenth Amendment's guarantee of due process did not constrain it from announcing the new crime of fetal abuse. *See Whitner*, 492 S.E.2d at 786. (22a)

Contrary to respondents' characterization of the *Whitner* opinion, the court below did not reinterpret § 20-7-50 to include viable fetuses based on any evidence of legislative intent or unique statutory language. Nothing in the legislative history supports the

new construction adopted by the *Whitner* court. Pet. at 12-16; *see also Whitner*, 492 S.E.2d at 787 (Moore, A.J. dissenting). (25a) Indeed, to the contrary, the South Carolina Legislature ("Legislature") has repeatedly considered the problem of substance dependency during pregnancy, and has, to date, rejected all proposals to criminalize such conditions.[1] Nor is the statutory language at issue here significantly different from that utilized in the other state statutes construed across the country. Pet. at 16. Furthermore, even if respondents' characterization of the bases of the lower court's decision was accurate, none of these grounds would serve to insulate the new interpretation from federal constitutional review. This Court cannot be bound by a state court interpretation which violates the federal constitution. *See Raley v. Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 1265 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); Justice O'Connor, *Our Judicial Federalism*, 35 Case W. L. Rev. 1, 5-6 (1984) (Supreme Court has power to review a state court judgment if state court "upholds a particular action on the ground that it offends neither federal nor state law.").

II. THE *WHITNER* COURT MISCONSTRUED THE FEDERAL GUARANTEE OF DUE PROCESS NOTICE

While respondents readily admit that "the legislature did not expressly state that a child in section 20-7-50 included a viable fetus" nor did it "proscribe fetal abuse in so many words," Opp. at 19-20, they nevertheless claim that petitioners were afforded constitutionally mandated due process notice. *Id.* at 20. Unable to find the requisite

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[1]Respondents' argument that "none of these [state court] decisions categorically rejected or prohibited the legislature's power to criminalize the conduct for which the Petitioners were prosecuted," Opp. at 11-12, fails because: (I) this issue was not before the courts addressing the circumstances presented here; (ii) several courts did, in fact, note that a statute crafted to do what the *Whitner* court did would be unconstitutionally vague, *see, e.g., Welch*, 864 S.W.2d at 283; and (iii) the Legislature did *not* exercise its power to draft such a statute, because there was no legislative support to do so.

notice in the language of the statute, statutory context, legislative history, or any prior interpretation of the statute, respondents are thus relegated to arguing that three earlier cases interpreting completely distinct areas of state law, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), and *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), must be construed as providing the necessary due process notice. Opp. at 19. However, these cases involved neither § 20-7-50 nor the circumstances at issue here.

Because *Hall* and *Fowler* required the court to interpret a civil wrongful death statute, they fall squarely within the parameters of the development of common law tort principles, an area of the law in which state courts have traditionally been the primary engines of change. Petitioners cannot be expected to have divined the necessary due process notice from these decisions given their limited application. Similarly unavailing is respondents' contention that these decisions have always stood for the broad proposition that a viable fetus is a person vested with all legal rights. In fact, the *Whitner* court explained for the *first* time that these decisions should be interpreted in this way. *Whitner*, 492 S.E.2d at 780. (8a) Petitioners plainly could not have anticipated this new construction. Finally, petitioners cannot be expected to have garnered the requisite notice given the Court's perception of these decisions as articulated in *Roe v. Wade*:

> [S]ome States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.

410 U.S. 113, 161, 93 S.Ct. 705, 731 (1973) (citing, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 354-65 (1971)). Given this Court's understanding, no person could legally or logically be charged with notice of the proposition now urged by respondents.

Respondents' reliance on the decision in *State v. Horne*, is

similarly misplaced. First, the ruling in that case -- creating the new crime of "feticide" -- is based on the lower court's plenary authority to expand the common law. 319 S.E.2d at 704. Indeed, prior to the *Whitner* decision,[2] several lower courts had already noted this precise distinction, and specifically rejected respondents' argument in this regard. For example, as the court in *Tolliver v. State*, 90-CP-23-5178, Order (Ct. C.P., Greenville Cty, S.C. Aug. 10, 1992) (L. 171-77), *cert. denied*, (March 10, 1993), noted:

> The State relies on *State v. Horne*...to urge upon this court an interpretation of the word "child" to include "fetus." In that case, the South Carolina Supreme Court recognized for the first time in South Carolina the crime of feticide. But that case has no application to the facts of this case.... *In deciding the Horne case, the Supreme Court was exercising its power under the common law to make new law. This case does not involve the interpretation of common law.*

(Emphasis added). Second, contrary to respondents' contention, the decision in *Horne* does not involve the interpretation of § 20-7-50, nor does it propound an interpretation of the term "person" as used in any state statute. Beyond these distinctions, the *Horne* court's refusal to apply the newly defined crime of feticide retroactively appears to acknowledge the parameters of federal due process requirements. 319 S.E.2d at 704. Given the absence of support for their proposition, this Court must reject respondents' claim of notice.

III. *WHITNER* MISCONSTRUED THE PROHIBITION AGAINST VAGUE CRIMINAL STATUTES

Respondents' statement that "[t]he sole question before the

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[2]In South Carolina, "[t]here is no distinction between statutory and common law murder: the statute is merely declaratory of the common law." *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338, 339 (1989). By contrast, the South Carolina Supreme Court has no authority to expand the crime of child neglect because it is a statutory creature, and not a crime at common law. Moreover, a fetus was not recognized as a separate person in relation to a pregnant woman at common law. *See State v. Ashley*, 701 So. 2d 338 (Fla. 1997).

state supreme court and this Court is whether the State may prosecute this defendant for harm to a viable fetus from an admittedly unlawful act - the possession and use of crack cocaine," Opp. at 22, is fatally flawed.[3] South Carolina seeks to punish petitioners and other substance-dependent women who become pregnant for the crime of "child neglect" when the only unlawful act they could possibly be prosecuted for is "possession" of crack cocaine.[4] *See* S.C. Code Ann. § 16-1-90. This is the only crime in South Carolina which may even arguably apply under such circumstances as found here, and the only one for which petitioners could constitutionally be charged with notice.

In reality, respondents merely seek to achieve here what they have not been able to achieve through legislative enactment. And, once laid bare, it is clear that this effort contorts existing criminal law in South Carolina beyond all recognition. In this tortured endeavor, respondents seek both to stigmatize petitioners and to punish them more harshly as "child abusers" under § 20-7-50, a statute intended solely to address child neglect, for their purported "possession" of illegal substances. However, respondents cannot support an arrest and prosecution of petitioners for "possession" as that crime has been interpreted and enforced to date. *See* S.C. Code § 16-1-90; *State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990). Nor can

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[3]Respondents' contentions that petitioners "admitted that they harmed their children," and the children were "born suffering from drug withdrawal symptoms," Opp. at 23-24, are supported neither by the record, *see* (51a-56a; 75a-81a), nor scientific research. *See* Zuckerman, Barry, "Drug Exposed Infants: Understanding the Medical Risk," in *The Future of Children* 26, 31 (1991) ("A withdrawal syndrome has not been identified and, therefore, at this time it is inaccurate to describe a cocaine-exposed newborn as crack-addicted.").

[4]Respondents' claim that "use" of an illegal substance is a crime in South Carolina, Opp. at 22, is false. No South Carolina statute incorporates this notion, and no state court to date has so ruled. Moreover, this Court has long recognized that drug addiction is a disease, not a crime. *See Robinson v. California*, 370 U.S. 660, 667 n.8, 82 S.Ct.1417, 1420, n.8 (1962); *Linder v. United States*, 268 U.S. 518, 45 S.Ct. 446 (1925).

they do so with regard to "child neglect," as that crime has been interpreted and enforced to date. For these reasons, they sought to use a woman's substance addiction as the basis for the prosecution of a crime that is not on the books, has *never* been interpreted as subsumed under the existing child neglect statute, and, in fact, was rejected by the Legislature. Respondents cannot graft an element (or some variation of an element) of one crime -- here, the crime of possession -- onto an existing statute that criminalizes different conduct -- *i.e.*, child neglect -- and then proclaim that the resulting new offense has always been recognized. This Court cannot find the required due process notice in this *post hoc* revision of a felony statute. Respondents are relegated to enforcing the existing penal laws of South Carolina; they are not empowered to manufacture new crimes by way of enforcement.[5]

Furthermore, respondents' argument that the wholly-undefined scope of conduct covered by this newly created class of crimes does not render the interpretation unconstitutionally vague, *see* Opp. at 22-23, completely misconstrues federal law. In fact, § 20-7-50, as interpreted by the court below, runs so far afoul of cardinal due process principles that no judicial construction could rectify the statute's constitutional shortcomings. The statute, construed to apply to a woman's prenatal conduct, is impermissibly vague, both in the sense that it fails to provide any notice of the "conduct ... forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954), and encourages subjective and discriminatory arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42 (1940).

Respondents concede -- as they must -- that nothing in § 20-7-50 "proscribe[s] fetal abuse in so many words." Opp. at 20. They

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[5]This Court has repeatedly stressed that penal statutes which are silent on the issue of mental state must be construed "in light of the background rules of the common law" under which "the requirement of some mens rea for a crime is firmly embedded." *Staples, III v. United States*, 511 U.S. 600, 605, 114 S.Ct. 1793, 1797 (1994); *see United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864, 2873 (1978).

further concede, *id.* at 22-23, as did the court below, *see Whitner*, 492 S.E.2d at 782 (12a), that the new interpretation creates a law with an "unlimited scope" with the potential to engender an "indefinite number of new crimes." *See Welch*, 864 S.W.2d at 283. As the court aptly noted in *Welch*, such a broad and ill-defined scope "could be construed as covering the full range of a pregnant woman's behavior -- a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Id.* The principle is well-established that where the activities proscribed are so uncertainly defined, the offending ordinance must be struck for vagueness. *See, e.g., Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563 (1971).

Because § 20-7-50 was written for an entirely different purpose, there is no delineation of any objective criteria for determining what an individual must do to satisfy the commands of the statute. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). Moreover, respondents' case-by-case approach only serves to exacerbate this defect. Under these circumstances, there can be no doubt that petitioners could not possibly have foreseen that their prenatal conduct might render them subject to criminal prosecution.

In addition to concerns about providing notice to citizens, the Court has emphasized that the potential for "arbitrary and discriminatory enforcement" is a particular evil that vagueness review is designed to combat:

> Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." [*Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242 (1974)]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858

(1983). Respondents' attempt to circumvent these fundamental precepts of the vagueness doctrine is thinly veiled.[6] They cannot avoid the infirmities inherent in their newly established crime merely by pronouncing that petitioners had notice that their conduct violated the statute. *See* Opp. at 24. The ill-defined panoply of crimes for which respondents seek this Court's approval simply does not pass constitutional muster.

Finally, respondents cannot cure these constitutional infirmities simply by positing the possible parameters for future prosecutions. *See* Opp. at 24-25. First, the proposed parameters do not -- and indeed, cannot -- cure either the due process notice or vagueness defects underlying the prosecution of petitioners in this case. *Id.* Second, the limitations noted -- *e.g.*, proof of causality and harm -- cannot remedy the unjust prosecution of these women in the first instance.

IV. BECAUSE THE *WHITNER* DECISION WAS NOT BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS, THIS COURT IS NOT PRECLUDED FROM REVIEWING THAT DECISION

Respondents' contention that petitioner Crawley is not entitled to raise any federal constitutional claims is without basis in law or fact. *See* Opp. at 25-28. First, respondents admit that petitioner Crawley raised federal due process claims in her state habeas corpus petition, and that the court specifically noted these claims in its recitation of the issues raised. *See id.* at 26; (84a-87a); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513 (1991).

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[6]Contrary to respondents' claim, Opp. at 23, this Court may review petitioners' challenge to the new interpretation of § 20-7-50 precisely because the circumstances contemplated by this Court in *Webster v. Reproductive Health Services*, 492 U.S. 490, 506, 109 S.Ct. 3040, 3050 (1989) are now present. The *Whitner* court, by retroactively incorporating a new declaration of fetal personhood into the statute, has unconstitutionally burdened petitioners' reproductive rights. Thus, the concerns raised by the Court in *Webster* have now come to fruition.

Second, the law is clear that this Court may review by certiorari final judgments on federal questions arising in state courts. *McGoldrick v. Compaignie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670 (1940). Third, there is no applicable state procedural bar precluding this Court's review of the constitutional issues addressed below,[7] and fourth, even if there was such a bar, it would not constitute an adequate and independent state ground for the lower court's decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638 (1985) (procedural bar does not preclude Supreme Court review if state court does not rely on it).

CONCLUSION

This Court should grant the petition for certiorari in order to redress the conflict among state courts regarding the interpretation of federal due process guarantees.

Dated: New York, New York
April 30, 1998

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[7] *Evans v. Manning*, 217 S.C. 10, 59 S.E.2d 341 (1950), is inapposite because the decision merely holds that issues not raised in a habeas petition cannot later be revived in the appellate court reviewing the habeas determination. Moreover, in this case, petitioner Crawley raised the federal constitutional claims in her habeas petition.

MOTION FILED
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No. 97-1562

In The

Supreme Court of the United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI* AND BRIEF IN SUPPORT OF THE PETITION FOR *CERTIORARI* OF THE NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, SOUTH CAROLINA ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AMERICAN NURSES ASSOCIATION, SOUTH CAROLINA NURSES ASSOCIATION, AMERICAN MEDICAL WOMEN'S ASSOCIATION, NATIONAL ASSOCIATION FOR FAMILIES AND ADDICTION RESEARCH AND EDUCATION, ASSOCIATION FOR MEDICAL EDUCATION AND RESEARCH IN SUBSTANCE ABUSE, AMERICAN ACADEMY ON PHYSICIAN AND PATIENT, SOCIETY OF GENERAL INTERNAL MEDICINE, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC., NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, COALITION ON ADDICTION, PREGNANCY AND PARENTING, NOW LEGAL DEFENSE AND EDUCATION FUND, LEGAL ACTION CENTER, WOMEN'S LAW PROJECT, DRUG POLICY FOUNDATION, AND ALLIANCE FOR SOUTH CAROLINA'S CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

Pursuant to Sup. Ct. Rule 37.2(b), the above organizations ("*amici*") move for leave to file the attached brief *amici curiae* in support of the Petition for *Certiorari*.

If left to stand, the ruling in *Whitner v. South Carolina*, 492 S.E. 2d 777 (S.C. 1997) would require for the first time in the nation that physicians, health care providers, and social services workers (among others), under threat of criminal penalties, divulge to state authorities, for possible prosecution, the identities and medical information of pregnant women who engage in conduct or activities that may "adversely affect[ ]" the health or welfare of their fetuses. S.C. Code § 20-7-510(A). Because any number of acts or omissions on the part of a pregnant woman could have an adverse impact on fetal development, the decision below imposes a duty of unknowable dimensions and sweeping breadth on all health and social services providers who serve pregnant women. Moreover, *Whitner* places physicians and other health professionals, who regard confidentiality as an essential part of patient care in an untenable ethical bind: either risk jail by upholding the confidentiality that is an essential part of medical care and is particularly critical for effective treatment, or disclose clients' identities in compliance with state reporting requirements, possibly imperiling the health and well-being of pregnant women and their fetuses. The intent of the *amici* is to bring to the Court's attention the troubling consequences of the *Whitner* decision for the medical and social services professionals of South Carolina.

This motion is necessary because Respondent State of South Carolina has declined to consent to the filing of proposed *amici*'s brief.

INTEREST OF THE *AMICI CURIAE*

As the names of the *amici* organizations suggest, and the descriptions of these organizations in the attached brief underscore, *amici* comprise a broad array of South Carolina and national medical, social services, legal services, and substance abuse treatment organizations, with memberships that range from direct service providers to researchers, academics, and theorists. What unites these organizations is a dual recognition that substance abuse is a treatable disease but that the South Carolina Supreme Court's decision in *Whitner* threatens to stymie the delivery of effective treatment to some of the most vulnerable patients in the community.

Amici share at least three basic, interrelated interests in this case. First, *amici*, many of whom provide prenatal and substance abuse treatment to pregnant women, are interested in this litigation because of the confusion, dangers, and conflicts that all medical and social services professionals who serve pregnant women in South Carolina face in the wake of the *Whitner* decision.

Second, *amici* physicians and medical providers are interested in this litigation because the state supreme court, by re-writing South Carolina's reporting law to include fetal abuse, strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients. To compromise the doctor-patient relationship is to compromise care. The result will be damaged health, increased suffering, escalating health care costs, and decreased life expectancy.

Third, *amici* are concerned that the decision below will deter pregnant women from obtaining adequate prenatal care, including substance abuse treatment. As *amicus curiae* South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") notes, in the wake of the highly publicized decision below, at least two alcohol and drug treatment programs in the Columbia, South Carolina, area have experienced precipitous drops in the number of pregnant women seeking admission. *Amici*, individually and as a

whole, have professional and ethical interests in promoting women's and children's health, and therefore in preventing this effect, and wish to apprize this Court of the tragic health implications of the state supreme court decision for pregnant women and their children.

Respectfully submitted,

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I.

INTERESTS OF THE *AMICI CURIAE*

Amici seek to shed light upon the confusion, dangers and conflicts that all medical and social service professionals who serve pregnant women in South Carolina face in the wake of *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997).[1] The unprecedented expansion of the state's child neglect and abuse laws subjects health care and social service professionals to criminal sanctions for failing to divulge the identities and medical histories of some of their most medically vulnerable and needy clients to state authorities for possible prosecution. At the same time, persons bound by the state's reporting statute lack any guidance as to which pregnant clients they must report. Because of the intolerable legal risks and ethical dilemmas created by *Whitner*, this Court should grant *certiorari* in this case.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the nation's largest organization of alcohol and drug counselors, with 17,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief because it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter pregnant women from seeking these essential services.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the South Carolina state affiliate of NAADAC. Its 495 members work as alcohol and drug counselors throughout the state in both the public and private sectors. Like NAADAC, SCAADAC is troubled by the serious legal and ethical dilemmas facing its membership in the wake of *Whitner*. SCAADAC is also in a

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[1] Petitioners consent to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

position to document some of the consequences of the *Whitner* decision. After the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's decision upholding her conviction and sentence, on July 15, 1996, at least two programs in the Columbia, South Carolina, area that give priority to pregnant women have already reported precipitous drops in admissions for pregnant women. The records of the Women's Community Residence, a halfway house for women substance abusers, show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. At the Women's Intensive Outpatient program, an intensive day program which provides child care, admissions of pregnant women declined 54% (from 13% to 6% of the total number of women treated at the facility) during roughly the same period. In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution.

Amici Curiae American College of Obstetricians and Gynecologists, American Nurses Association, South Carolina Nurses Association, and American Medical Women's Association are associations of medical professionals knowledgeable about the health care needs of pregnant and parenting women. They join this brief out of their concern that the health and well-being of women and their children will be grievously harmed by the decision below.[2]

II.

INTRODUCTION

In declaring a viable fetus to be a "child" within the meaning of the state Children's Code, the South Carolina Supreme Court's decision below imposes upon physicians,

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[2] Further statements of interest are set forth in the Appendix to this brief.

substance abuse treatment providers, and social service professionals a heretofore unimaginable duty: to divulge to state authorities, for possible prosecution, the identities and medical information of pregnant women who engage in conduct or activities that may "adversely affect[ ]" the health or welfare of the fetus. S.C. Code § 20-7-510. Professionals who fail to disclose such information now themselves face criminal fines and imprisonment under state law. *See* S.C. Code § 20-7-560. Yet, the ruling below imposes a duty of unknowable dimensions and sweeping breadth on all health and social services providers who serve pregnant women. The unprecedented and altogether vague nature of the *Whitner* decision is causing significant confusion and fear among medical and social services professionals who must now divine what actions or omissions of pregnant women might trigger the statutory reporting requirement.

The *Whitner* decision further creates an intolerable dilemma for physicians and health care providers: either risk jail by upholding the confidentiality that is an essential part of medical care and is particularly critical for effective treatment, or disclose clients' identities in compliance with state reporting requirements, possibly imperiling the health and well-being of pregnant women and their fetuses.

The *Whitner* decision also has produced real and devastating consequences for pregnant women, many of whom are now avoiding prenatal care and drug and alcohol treatment for fear that confiding their health problems to their physicians or counselors could lead to their arrest and imprisonment. If let stand, the decision below will seriously compromise the ethical practice of medicine, cause irreparable harm to patients, and severely impair the provision of vital health and social services.

Lastly, the criminal penalties that *Whitner* foists upon treatment providers and their pregnant patients fly in the face of the longstanding recognition, in this Court as well as in the medical community, that addiction is a disease, not a crime. *See Linder v. United States*, 268 U.S. 5, 18 (1925) (Addicted persons "are diseased and proper subjects for [medical] treatment."). *Cf. Robinson v. California*, 370 U.S. 660 (1962)

(holding unconstitutional a state law making narcotic addiction a crime). For all of these reasons, the Court should grant the petition for *certiorari* in this case.

III.

REASONS FOR GRANTING THE PETITION

A. THE PETITION SHOULD BE GRANTED BECAUSE OF ITS EXCEPTIONAL IMPORTANCE TO MEDICAL AND SOCIAL SERVICES PROVIDERS WHO SERVE PREGNANT PATIENTS.

In expanding the state's child neglect law to reach the conduct of pregnant women, the South Carolina Supreme Court in *Whitner* imposes a vague and sweeping mandatory reporting requirement upon health care and social services providers. The reporting statute provides in relevant part:

> A physician, nurse, dentist, optometrist, medical examiner or . . . any other medical, emergency medical services, mental health, or allied health professional or . . . school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or child care worker in any day care center or foster care facility, police or law enforcement officer . . . or persons responsible for processing of films or any judge *shall report* in accordance with this section *when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.*

S.C. Code § 20-7-510 (A) (emphases added); *see Whitner*, 492 S.E.2d at 782 (upholding defendant's child abuse conviction upon finding that the use of cocaine during pregnancy "can cause serious harm to the viable unborn child"). A health care professional's knowing failure to report a case of child abuse or neglect constitutes a misdemeanor punishable by fine and/or imprisonment of up to six months. S.C. Code § 20-7-560.

The *Whitner* decision radically expands the concept of child abuse, requiring health and social services professionals to report an ill-defined yet vast array of conduct that might damage a fetus. This standardless extension of child abuse law has caused substantial confusion and fear within the medical community. South Carolina practitioners must now divine, upon threat of imprisonment, what conduct by a pregnant woman may adversely affect her fetus's "physical or mental health or welfare," S.C. Code § 20-7-510 (A), and must report all women with viable pregnancies engaging in such conduct who seek their professional services to state authorities for possible prosecution. No proof of harm to the child is required under § 20-7-510. The reporting requirement apparently applies wherever a child (or, under *Whitner*, a fetus) "is likely to be endangered." The state supreme court determined that a woman's ingestion of cocaine during the third trimester of pregnancy is likely to have fetotoxic effects. That determination is the subject of scientific dispute, yet in South Carolina it is "true" as a matter of law. *See infra*, notes 3-7, and accompanying text. Indeed, the record contains no evidence that the children of both petitioners, Cornelia Whitner and Malissa Ann Crawley, are unhealthy in any way. Nonetheless, health care providers and social services professionals are now obligated to report a pregnant woman where there is merely "reason to believe" the woman engaged in any conduct that may adversely affect the health of the viable fetus. To be sure, under *Whitner*, the statute's reporting requirements are by no means limited to the use of illicit substances such as cocaine. As the court made clear, § 20-7-510 covers any action "likely to endanger the child without regard to whether the action is illegal in itself." *Whitner*, 492 S.E.2d at 781-82.

As the dissenting justices of the South Carolina Supreme Court and the rulings of every state court to have addressed this issue have observed, the enlargement of child abuse statutes to reach maternal conduct that may endanger a fetus leads to absurd, unintended, and dangerous results: health and social services professionals, among others, must guess whether, for example, a pregnant woman's failure to obtain

prenatal care, to quit smoking or drinking, to stop taking over-the-counter medicine, or to refrain from playing rigorous sports constitutes unlawful behavior. *See id.* at 788 (Moore, J., dissenting); *Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (per curiam); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993); *Reinesto v. Arizona*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995).

For the medical community, these scenarios are not mere idle speculation. Indeed, from the perspective of health professionals who are guided by science and hard data, the *Whitner* decision portends an infinite variety of circumstances that could be interpreted as triggering the state's reporting requirement. The South Carolina Supreme Court establishes as an irrefutable fact that a pregnant woman's ingestion of any measurable amount of cocaine constitutes child abuse. By necessary implication, fetal exposure to any other substance for which scientific data shows an equivalent or greater degree of risk must likewise be deemed child abuse. This is troubling for the simple reason that, notwithstanding the South Carolina Supreme Court's statement to the contrary, "[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present."[3] In contrast to the evidence relied upon in *Whitner*, a number of studies have found *no* detectable increase in the rate or severity of birth defects associated with cocaine use during pregnancy.[4] Although the

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[3] E. Hutchins, *Drug Use During Pregnancy*, 27 J. of Drug Issues 463, 465 (1997).

[4] *See* A.J. Tuboku-Metzger *et al., Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally*, 13 American J. of Perinatology 1 (1996) (study of chronic cocaine use among pregnant subjects finding no direct effects on the health or development of newborns); B.B. Little *et al., Is There a Cocaine Syndrome? Dysmorphic and Anthropometric Assessment of Infants Exposed to Cocaine*, 54 Teratology 145 (1996) (finding no recognizable constellation of dysmorphic features to distinguish between cocaine-exposed and non-exposed infants); N.S. Woods et al., *Cocaine Use During Pregnancy: Maternal Depressive Symptoms and Infant Neurobehavior over the First Month*, 16 Infant Behavior and Dev. 83, 92 (1993) (finding no differences in neurobehavioral performance of cocaine-

popular press of the late 1980s fueled what one scientist called a "mythology of severe risk" of fetal harm from cocaine use during pregnancy, these press accounts rested upon a handful of early studies (now more than a decade old).[5] Some of those studies did not show what the media claimed, and others were methodologically unsound and have subsequently been discredited.[6] As of the present time, there remains genuine

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exposed infants when compared to non-exposed infants); C.D. Coles *et al.*, *Effects of Cocaine and Alcohol Use in Pregnancy on Neonatal Growth and Neurobehavioral Status*, 14 Neurotoxicology and Teratology 23, 31-32 (1992) (finding prenatal cocaine exposure effects fetal growth but that cocaine-exposed infants do not appear otherwise impaired physically or behaviorally in the neonatal period). *See also* L.E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 23-25 (1997) (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

[5] *See generally* J. Morgan & L. Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up to Be, in Crack in America: Demon Drugs and Social Justice* 149-54 (C. Reinarman & H.G. Levine eds. 1997) (virtually all adverse outcomes found in fetal studies involving cocaine were reported in the mass media as evidence that crack *causes* damage in babies even though no study has convincingly shown that to be so); Gomez, *supra* note 4, at 11-26 (same).

[6] The studies examining the effects of prenatal cocaine exposure on newborns and infants – particularly the early studies that gave rise to the "crack baby" scare – suffer from methodological problems that markedly limit or vitiate their significance. These problems include small sample sizes; failure to control for the effects of confounding variables such as maternal malnutrition, lack of prenatal care, the use of other drugs such as nicotine, alcohol, and prescription medications; and the assignment of women to a study or control group based on either maternal self-reporting of cocaine use or a single urinalysis test. *See* B.M. Lester *et al.*, *Data Base of Studies of Prenatal Cocaine Exposure and Child Outcome*, 27 J. of Drug Issues 487 (1997) (computerized assessment of scientific literature concluding that knowledge about the existence or extent of effects of prenatal cocaine exposure on child outcome is limited, scattered, and compromised by methodological shortcomings); E. Hutchins, *Drug Use During Pregnancy*, 27 J. of Drug Issues 463, 466 (1997).

scientific dispute as to whether a causal link exists between cocaine use and serious fetal harm.[7]

If the controversial evidence in *Whitner* is sufficient to find that prenatal cocaine exposure is a ground for child abuse, then a host of other activities and substances would also appear to trigger the child abuse reporting requirement. There is longstanding scientific consensus that various elicit substances, including alcohol[8] and

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[7] *See* note 4, *supra; see also* C.D. Coles, *Saying "Goodbye" to the "Crack Baby"*, 15 Neurotoxicology and Teratology 290 (1993) ("The hysteria and poorly considered reactions of . . . the public have made the 'crack baby' for years an embarrassing episode."); D.R. Neuspiel, *Cocaine and the Fetus: Mythology of Severe Risk*, 15 Neurotoxicology and Teratology 305 (1993) ("mythology of severe risk" of gestational cocaine exposure persists despite contrary scientific evidence). It should be noted that some researchers have found an increase in genitourinary tract malformations and decreases in birth weights, body length and head circumferences of cocaine-exposed neonates. However, researchers note that the pregnant cocaine users in such studies have clustering of other serious reproductive risk factors – notably, elevated tobacco and alcohol use – and a lack of prenatal care that "confound" conclusions about cocaine's toxicity. Researchers also observe that these findings do not appear predictive of longer-term physiological, behavioral or cognitive deficits. *See, e.g.*, H. Hurt *et al., Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing*, 151 Arch. Pediatric & Adolescent Med. 1237 (1997); H. Hurt *et al., Play Behavior in Toddlers with In Utero Cocaine Exposure: A Prospective, Masked, Controlled Study*, 17 J. Developmental and Behavioral Pediatrics 373 (1996); D.E. Hutchings, *The Puzzle of Cocaine's Effects Following Maternal Use During Pregnancy: Are There Reconcilable Differences?*, 15 Neurotoxicology and Teratology 281 (1993); G. Koren, *Cocaine and the Human Fetus: The Concept of Teratophilia*, 15 Neurotoxicology and Teratology 301 (1993).

[8] Fetal Alcohol Syndrome is the leading cause of mental retardation in the United States. L.P. Finnegan & S.R. Kandall, *Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook* 513, 529 (J.H. Lowinson *et al.* eds., 1997) [hereinafter "*Comprehensive Textbook*"].

tobacco,[9] can cause serious, irreversible harm to the developing fetus. The same is also true of a wide range of commonly prescribed medications. These include psychiatric medications, such as anticonvulsants,[10] Lithium and other mood-

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[9] Low birth weight, sudden infant death syndrome, spontaneous abortion, premature rupture of the membranes, and abnormal placentation are associated with maternal tobacco use. *See, e.g.*, L.C. Castro *et al.*, *Maternal Tobacco Use and Substance Abuse: Reported Prevalence Rates and Associations with the Delivery of Small for Gestational Age Neonates*, 81 Obstetrics and Gynecology 396 (1993); Office on Smoking and Health, *The Health Consequences of Smoking: Nicotine Addiction* 602 (1988). The teratogenic effects of tobacco and alcohol are particularly relevant because women who ingest cocaine during pregnancy are more likely to use tobacco and alcohol than are non cocaine-users. M. Bendersky *et al.*, *Characteristics of Pregnant Substance Abusers in Two Cities in the Northeast*, 22 Am. J. Drug & Alcohol Abuse 349, 353 (1996).

[10] A leading scientific text notes that the teratogenic affects of anticonvulsants were identified in the 1960's, especially those caused by the drug Dilantin, commonly prescribed for epileptics and that "[n]o dose response curve has been demonstrated, nor has a "safe" dose been found below which there is no increased teratogenic risk." K.L. Jones, *Smith's Recognizable Patterns of Human Malformation* 559 (5th ed. 1997) [hereafter "*Smith's Recognizable Patterns of Human Malformation.*"]. Other anticonvulsants associated with facial malformations, mental deficiencies, speech disorders, and cardiovascular defects include trimethadione, valproic acid, and warfarin. *Id.* at 564-69. With respect to trimethadione in particular, it warns that "the frequency and severity of defects associated with maternal use of these drugs during pregnancy are high enough to warrant consideration of early elective termination of pregnancy." *Id.* at 500 (citing G.L. Feldman *et al.*, *The Fetal Trimethadione Syndrome*, 131 Am. J. Dis. Child 1389 (1977)). Another standard medical text notes: "An association of fetal abnormalities with anticonvulsants is strengthened by increasing reports of cleft palate, cardiac abnormalities, craniofacial anomolies, nail and digit hypoplasia, visceral defects, and mental subnormality in children of epileptic mothers taking anticonvulsant drugs." *The Merck Manual of Diagnosis and Therapy* 1859 (R. Berkow ed., 16th ed. 1992) [hereafter "*Merck Manual.*"].

stabilizers,[11] antipsychotics, and benzodiazepines (the class of medications which includes Valium, Librium and Xanax),[12] as well as some antibacterials (especially Tetracyclines),[13] anticoagulants,[14] thyroid medications,[15] and antihypertensive

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[11] "Among psychotropic drugs, lithium has been more strongly associated with congenital anomolies than have other agents. . . . [N]umerous publications indicate an increased incidence of cardiovascular abnormalities, particularly an increase in Ebstein's anomoly in infants born of lithium-treated mothers." J.G. Berstein, *Handbook of Drug Therapy in Psychiatry* 415 (2d ed. 1988) (citing G.E. Robinson *et al., The Rational Use of Psychotropic Drugs in Pregnancy and Postpartum* 31 Can J. Psychiatry 183 (1986)).

[12] *Id.* at 407 ("Lithium presents a significant risk to fetal development if taken during the first trimester. . . . Benzodiazepines and meprobomate have a significant risk of teratogenic effects. . . . "). The specific birth defects (or "anomalies") associated with these and other psychiatric medications taken during pregnancy include: growth retardation and oral clefts (barbiturates); cleft palates, neurologic depression and low Apgar scores (benzodiazepines); "severe anomalies in 12% of newborns" (meprobomate); respiratory distress (antidepressants); chromosomal gaps and breaks, congenital heart anomalies; reduced thyroid function; and external ear malformations (lithium carbonate and the other mood-stabilizing drugs). *Id.* at 407-421 (citing W.S. Barry and S.M. St. Clair, *Exposure to Benzodiazepines in Utero* 1 Lancet 1436 (1987)); M.J. Whittle and K.P. Hanretty, *Prescribing in Pregnancy: Identifying Abnormalities*, 293 Br. Med. J. 1485 (1986).

[13] Tetracycline has been associated with permanent discoloration of the teeth, enamel hypoplasia, and a lowered resistance to caries, as well as retarded bone growth, especially when taken during the latter part of the pregnancy. *Merck Manual* at 41.

[14] Certain anticoagulants, including Warfarin, can cause nasal abnormalities, bone stipling, bilateral optic atrophy, varying degrees of mental retardation, microcephaly, and occasionally fetal and maternal hemorrhage. *Smith's Recognizable Patterns of Human Malformation* at 568.

[15] Some thyroid medications taken during pregnancy can cause severe hypothyroidism, fetal goiter, or scalp defects. *Merck Manual* at 1859.

drugs.[16] Even "[l]arge doses of aspirin may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding."[17] Additionally, prenatal exposure to adverse environmental factors such as poor nutrition, substandard housing and a lack of social supports and services (all of which are associated with poverty) can also profoundly affect infant health,[18] as can a childhood spent in the care of adults who suffer from depression or other serious mental illness.[19]

As these examples illustrate, the reporting obligations of South Carolina professionals vis-a-vis pregnant women are potentially limitless and are fraught with uncertainty. At the very least, there now appears to be a strong presumption that health care and social service professionals must report pregnant women who smoke tobacco or drink alcohol. It also is entirely plausible that *Whitner* obligates South Carolina health and social services professionals to report for prosecution *all* pregnant patients who engage in *any* conduct that may adversely affect the health of the fetus, even where the evidence linking the conduct with harmful consequences is uncertain or contradictory. The confusion wrought by the vagueness of the *Whitner* decision is enormously troubling for

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[16] These drugs may cause fetal respiratory depression, hypotension, paralytic ileus, bradycardia, hypoglycemia, and varying degrees of intrauterine growth retardation. *Id.* at 1861.

[17] *Id.* at 1859; *see also* L.J. Van Marter *et al., Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy*, 97 Pediatrics 658 (1996) (maternal consumption of aspirin during pregnancy found to be consistently associated with pulmonary hypertension of the newborn, an important cause of respiratory failure in neonates).

[18] N.S. Gustavsson & A.E. MacEachron, *Criminalizing Women's Behavior*, 27 J. of Drug Issues 673, 675-76 (1997).

[19] *See, e.g.*, J.A. Doane, *Family Interaction and Communication Deviance in Disturbed and Normal Families: A Review of Research, in Advances in Family Psychiatry – Vol. II* 113 (J.G. Howells ed., 1980).

a wide variety of health care and social services professionals. This confusion becomes intolerable when compounded by the criminal sanctions, including imprisonment, that befall those professionals who fail first to divine and then to comply with the state's reporting requirement.[20]

B. THE PETITION SHOULD BE GRANTED TO AVERT WIDESPREAD AND SERIOUS HARM TO PREGNANT WOMEN.

By expanding South Carolina's child abuse reporting requirement to include cocaine use by pregnant women, the *Whitner* opinion compels medical providers to breach patient confidentiality in a particularly critical context. Adequate prenatal care requires patients to provide accurate information to their health care professionals – especially about use of a substance that might pose a risk to the fetus. Yet, under *Whitner*, patients in South Carolina have every incentive to hide critical information since any admission of drug use or other potentially risky activity *must* be reported to state authorities. By casting treatment providers as law enforcement agents, with interests adverse to the patients they are sworn to care for, the *Whitner* decision makes doctors, nurses, substance abuse counselors and other treatment providers accessories to a public health tragedy that is both predictable and preventable.

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[20] As the discussion of confidentiality in the next section underscores, the *Whitner* decision also places treatment providers in a double bind by pitting fetal health against maternal well-being, forcing providers to choose which patient to treat. In light of *Whitner*, South Carolina physicians might feel legally constrained from recommending or prescribing therapies to their pregnant patients that could, but might not, result in fetal harm – be it chemotherapy or radiation treatment for cancer, or even the administration of drugs commonly used during labor and delivery which can themselves cause fetal central nervous system depression, anoxia, hypothermia, low Apgar scores, impaired metabolic responses, and neurological depression. *Merck Manual* at 1861.

An environment of communication and trust is crucial for preventing or reducing harm to drug-exposed infants. Maintaining the confidentiality of the identities and communications of pregnant patients can decrease the harm to women and their children in several ways. First, drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine[21]: in most cases, a patient's drug use is not apparent if the patient does not disclose it. Thus, important medical benefits can accrue when a treatment provider can permit the patient to feel sufficiently comfortable to divulge highly personal, often stigmatizing, sometimes incriminating information.[22] Even if the pregnant patient does not discontinue her drug use, the negative health effects associated with prenatal drug exposure can be significantly reduced through adequate prenatal care and counseling if the patient embraces the therapeutic relationship.[23] Second, open communication with physicians regarding drug use is necessary to insure safe deliveries.[24] Third, adequate parenting skills and a supportive environment may compensate for prenatal risk factors created

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[21] I. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 The Pediatric Clinics of North Am. 1043, 1410 (1988).

[22] *See* R. Arnold *et al.*, *Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research* 345 (M. Lipkin, Jr. *et al.* eds., 1995); A. Lazare, *Shame, Humiliation, and Stigma in the Medical Interview, in id.* at 333.

[23] *See, e.g.*, A. Racine *et al.*, *The Ass'n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993).

[24] Patients using cocaine "may have untoward responses to anesthesia," yet identification of such patients prior to the initiation of anesthesia "has proven difficult," as many of these patients deny illicit drug use. D.J. Birnbach *et al.*, *Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay*, 84 Anesthesia Analg. 76 (1997). *See also* D. Campbell *et al.*, *Unrecognized "Crack" Cocaine Abuse in Pregnancy*, 77 British J. Anaesthesiology 553, 555 (1996) (Eliciting information from obstetric patients about cocaine use is important because the "interaction of cocaine with other local anaesthetics makes the calculation of a safe maximum dose difficult.").

by prenatal drug exposure.[25] These skills and this environment, in turn, can be cultivated through a positive alliance with health care providers. In short, a climate of confidentiality is essential if patients are to disclose drug use and/or seek continued care and counseling from health professionals in order to reduce the potential harms caused by substance use during pregnancy.

For competent care of any patient, it is undisputed that patient confidentiality must be jealously guarded:

> To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people. Violation of confidentiality also shows disrespect to the patient as a human being. . . . [26]

The usual importance of patient confidentiality becomes all the more critical in the context of substance abuse treatment:

> It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery. . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.[27]

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[25] *See, e.g.*, Finnegan & Kandall, *supra* note 8, at 523.

[26] Arnold *et al.*, *supra* note 22, at 365 (citation omitted).

[27] M.J. Kreek & M. Reisinger, *The Addict as a Patient, in Comprehensive Textbook* 822, 830; *see also* R. Elk *et al.*, *Behavioral Interventions: Effective and Adaptable for the Treatment of Pregnant Cocaine-Dependent Women*, 27 J. of Drug Issues 625, 630, 632 (1997)

The decision below now directly undermines the ethical obligations, professional training, and standard of practice applicable to physicians and other health care providers.[28] Indeed, the *Whitner* decision forces treatment professionals into a painful and cruel dilemma – whether to breach the patient confidentiality so essential to medical care and drug treatment services, or violate state law and be subject to imprisonment. This conflict presents an untenable situation for South Carolina's health care providers who seek to adhere to the basic tenets of medical practice while providing quality care for their patients. Quality care in conformity with ethical standards forbids any treatment provider from violating the creed that is as old as the medical profession itself: Above all else a healer must do no harm.

("[C]onfidentiality must be rigidly adhered to and a trust in the staff established" to attract to and retain in treatment pregnant drug-dependent women.); National Council on Alcoholism and Drug Dep., Policy Statement, *Women, Alcohol, Other Drugs and Pregnancy* 5 (1990) ("States should resist efforts to weaken confidentiality protections for pregnant alcoholic and other drug-dependent women seeking prenatal care or alcoholism and/or drug treatment services.").

[28] The decision below may also require some providers to act in conflict with federal law. Title 42 U.S.C. § 290dd-2 (also known as the Federal Drug Treatment Confidentiality Statute) prohibits federally assisted drug-abuse treatment programs from divulging patient identities and records. Although this confidentiality provision "do[es] not apply to the reporting under State law of incidents of suspected child abuse and neglect," *id.* 290dd-2(e)(2), it is not at all clear whether the South Carolina Supreme Court's expansion of the term "child abuse" to cover maternal prenatal actions falls within the narrow exception envisioned and intended by Congress. This legal uncertainty, and the demands of seemingly conflicting legal mandates, further exacerbates the confusion, fear and frustration faced by South Carolina's physicians and other health care professionals.

One of the most effective weapons against infant mortality is early, high-quality, comprehensive prenatal care.[29] Prenatal care improves pregnancy outcomes even among women with addictions: pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies.[30] For this reason, public health organizations at the national, regional and state levels counsel against imposing criminal sanctions on pregnant women with addictions. The Board of Trustees of the American Medical Association addressing this very issue concluded that if the criminal justice system is used to deal with drug-abusing mothers,

> [p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."[31]

The Southern Regional Project on Infant Mortality echoes this warning. The Project, an initiative of the Southern Governors' Association and the Southern Legislative Conference, undertook a comprehensive three-year study of perinatal substance abuse in southern states, including South Carolina. Topping the list of the study's conclusions and recommendations, the Conference urges: "Emphasize prevention and treatment

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[29] Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 6 (1993).

[30] Racine, *supra* note 23, at 1585, 1586.

[31] American Medical Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990). The AMA accordingly resolved that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate." *Id.* at 2670. It is not mere speculation that the threat of criminal prosecution deters pregnant drug users from seeking both drug treatment and prenatal care: multiple studies have shown as much. *See, e.g.*, S.R. Kandall, *Substance and Shadow: Women and Addiction in the United States* 278-79 (1996); *see also* GAO, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women* 5, 20 (1991).

rather than punitive measures." Specifically, the Conference found:

> It is clear from these findings that fear of losing children is a major reason women delay or avoid seeking treatment. If pregnant women . . . feel that they will be "turned in" by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment. Attempts to impose criminal penalties for alcohol or drug use during pregnancy exacerbate women's fears and make it less likely they will seek or receive the care they need for either their pregnancies or their addiction.[32]

The American Society of Addiction Medicine concurs, declaring that

> [t]he imposition of criminal penalties solely because a person suffers from an illness is inappropriate and counterproductive. Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than

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[32] Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 21 (1993); *accord* Southern Legis. Summit on Healthy Infants and Families, Policy Statement 8 (1990) ("[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol."); Georgia General Assembly's Joint Conference on Children of Cocaine and Substance Abuse (Nov. 1, 1990) (recommending that the state treat cocaine-using pregnant women and declare a moratorium on legislation seeking to prosecute drug-dependent pregnant women).

> preventing, harm to children and to society as a whole.[33]

The National Association for Perinatal Addiction Research and Education similarly warns that

> criminalization of prenatal drug use . . . will deter women who use drugs during pregnancy from seeking the prenatal care which is important for the delivery of a healthy baby.
>
> * * *
>
> The prospect of criminal prosecutions . . . also places health care practitioners in a conflict position, forcing them to choose between maintaining their patient's [sic] confidentiality or reporting them, ultimately to the police, a position many doctors and nurses find intolerable.
>
> * * *
>
> [These women] do not want or intend to hurt their unborn children by using drugs. But, they need help, not threats, to overcome their problems.
>
> * * *
>
> The key to intervention will be access to health care for high risk women, not the threat of criminal prosecution.[34]

Even the United States General Accounting Office found that "the threat of prosecution poses . . . [a] barrier to treatment for pregnant women. . . . These women are reluctant to seek treatment if there is a possibility of punishment. . . . [W]omen in need of treatment are well aware of the threat [of child abuse prosecutions].[35] In fact, every leading public health and

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[33] American Soc'y of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989).

[34] National Ass'n for Perinatal Addiction Research and Educ., Policy Statement No. 1, *Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive* (1990).

[35] GAO, *supra* note 31, at 20.

medical organization to have considered the subject has rejected the criminalization of drug use during pregnancy.[36]

It appears that the fears of these organizations are being borne out. Drug treatment providers in South Carolina already have reported a marked decrease in the number of pregnant

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[36] *See, e.g.*, National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (A "punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children. . . . "); American College of Obstetricians and Gynecologists ("ACOG") Committee Opinion 55 (Oct. 1987) (resort to the courts "is almost never justified" in treating pregnant women); ACOG Technical Bulletin 195, *Substance Abuse in Pregnancy* 1 (1994) ("In some states, the legal requirements regarding reporting substance abuse threaten to interfere with patient confidentiality and the entire physician-patient relationship."); American Academy of Pediatrics, Comm. on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant."); American Nurses Ass'n, *Position Statement* (Apr. 5, 1992) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants. . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems."); California Medical Ass'n, Policy Position ("[T]o bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination.") *quoted in* American Medical Ass'n, *Legal Intervention During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2669 (1990); *see also, State v. Luster*, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy); M.L. Poland *et al., Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 Drug and Alcohol Dependence 199 (1993).

women with substance use problems seeking treatment and prenatal care in the wake of *Whitner*. *See* Part I, *supra*.

IV.

CONCLUSION

Whitner saddles health professionals with an ethical dilemma. It also poses a very real threat to the health and well-being of untold numbers of women and their families by driving pregnant women with health problems away from urgently needed medical, substance abuse, counseling, prenatal, and other necessary care. In short, *Whitner* threatens the integrity of medical practice and endangers the lives of women.

For the foregoing reasons, *amici curiae* respectfully request this Honorable Court to grant the petition for *certiorari*.

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APPENDIX

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the largest national organization of alcohol and drug counselors, with 17,000 members. Founded in 1972, NAADAC is committed to increasing general awareness regarding the problems associated with alcoholism and substance abuse and to enhancing the care of individual patients through treatment, public education, and outreach programs aimed at prevention. As an organization that certifies alcoholism and drug abuse counselors, NAADAC promotes and monitors adherence to ethical standards throughout the nation. NAADAC promotes quality treatment services for addicted individuals as the cornerstone of an effective national substance abuse policy. To be effective, however, alcohol and drug treatment requires the trust of the patient, a basic building block of which is the assurance of patient confidentiality. Under the ethical guidelines promulgated by NAADAC for its members, alcohol and drug treatment counselors are required to protect patients' confidences. NAADAC Code of Ethics, Principle 8(a). However, South Carolina alcohol and drug counselors now risk arrest if they fail to report any conduct that may endanger a fetus. The counselors do not know which actions or omissions of their pregnant clients trigger the newly expanded reporting requirements, as the legislature has never enacted a law addressing fetal abuse. The patients also face arrest and prosecution if their treatment provider discloses their identities to authorities. NAADAC is deeply concerned that the confusion and fear that the *Whitner* decision is causing will undermine the provision and quality of care administered

by South Carolina substance abuse professionals to pregnant patients, and the willingness of women to seek these essential services.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the South Carolina state affiliate of NAADAC. Founded in 1988, SCAADAC currently has 495 members. Members of SCAADAC are employed as alcohol and drug counselors throughout the state in both the public and private sectors. SCAADAC members have reason to believe that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution in the wake of the *Whitner* decision. Since the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's July 15, 1996, decision upholding her conviction and sentence, at least two treatment programs in the Columbia area that give priority to pregnant women have already experienced precipitous drops in admissions for pregnant women. The Women's Community Residence is a 24-bed halfway house for women substance abusers. The facility accepts applications from an average of 237 women per year, admitting approximately 133 women. The facility's admission records show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. The Women's Intensive Outpatient program is an intensive day program which additionally provides child care. It treats an average of 95 women per year. During approximately the same period, admissions of pregnant women to this program declined 54% (from 13% to 6% of the total number of women treated at the

facility). In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution. SCAADAC also shares the concerns of NAADAC regarding the serious legal and ethical dilemmas facing its membership as a result of the *Witner* decision below.

Amicus Curiae American College of Obstetricians and Gynecologists ("ACOG"), founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. The leading group of professionals providing health care to women, ACOG's more than 38,000 members represent over 90 percent of all obstetricians and gynecologists currently practicing in the United States. One of ACOG's many purposes is to educate health care professionals, law and policy makers and the general public about all aspects of women's health care. ACOG undertakes to assure that all women have access to prenatal care and to promote a healthy pregnancy for the benefit of both the fetus and the mother. ACOG is concerned that the threat of prosecution will drive pregnant women away from seeking care at a time when information and treatment could significantly improve maternal health and increase the chances of delivering a healthy baby.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work

practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing this nation's over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical to efforts to prevent disease and to provide early intervention for health care problems. Thus it opposes all barriers to prenatal care. ANA believes that the threat of criminal prosecution is a significant deterrent for substance-using pregnant women in need of prenatal care and treatment. Such a threat serves no one and only endangers the health of both mother and child.

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of ANA, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions speak strongly to support of health care for a number of vulnerable populations and to the reproductive rights of women. One of these rights must be to be able to seek prenatal health care secure in the knowledge that the health care providers are care givers and not threats to

the person seeking care. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the threat of criminal prosecution serves as a real deterrent to pregnant women who suffer from addictions disease from seeking and obtaining prenatal care.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the prosecution of pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that punishment for drug abuse will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care. Furthermore, the physicians of AMWA highly value the patient-physician relationship and are concerned that the threat of prosecution will erode this relationship.

Amicus Curiae National Association for Families and Addiction Research and Education ("NAFARE") is a not-for-profit partnership of health care, social science and child advocate professionals, attorneys, judges, educators and administrators that provides education and leadership in the development of multidisciplinary programs for preventing and treating alcohol, tobacco and other drug use in order to enhance the outcome for women,

their children, and their families. NAFARE has more than 1,000 members and 8,000 supporting members nationally. NAFARE's mission is to develop, synthesize and disseminate research-based information to professionals working with children and families affected by addiction. A particular focus of NAFARE's research and work addresses the issues faced by pregnant substance-using women and the long-term outlook for children who have been exposed *in utero* to licit and illicit drugs. Ira J. Chasnoff, M.D., President and Medical Director of NAFARE, is renown for his research into the effects of alcohol, cocaine and other drugs on pregnancy and infant outcome.

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying individuals with alcohol and drug problems, providing counseling, and referring them as necessary to treatment specialists; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. AMERSA believes

that a requirement to report pregnant addicts to authorities would produce net harm to the health of mothers and children by deterring such addicts and their families from obtaining prenatal care, addictions treatment, and counseling.

Amicus Curiae American Academy on Physician and Patient ("AAPP") is devoted to improving public health through research and education about the doctor-patient relationship, which lies at the core of effective health care. Since its founding in 1979, AAPP has developed, evaluated, and promulgated the leading model of medical education regarding the physician-patient relationship, and has trained over 3,000 physicians. The AAPP has shown that the therapeutic relationship between physician and patient depends on the assurance of confidentiality and physicians' unfettered ability to counsel and care for their patients. The AAPP, with a membership of more than 550 physicians from 10 countries, is devoted to strengthening the physician-patient relationship, and hence the quality of patient care, by promoting collaborative relationships between doctors and patients. The strength of the therapeutic relationship, in turn, affects the patient's willingness and ability to follow through with the treatment and the patient's response to the treatment. To compromise the doctor-patient relationship is to compromise care, and thereby to damage health, increase suffering, escalate medical costs, and decrease life expectancy. The AAPP believes that the *Whitner* decision, by rewriting South Carolina's reporting law to include fetal abuse, strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the

critical relationship between health care professionals and their pregnant patients.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in the field of general internal medicine. The Society, which has 2700 members in the United States (including South Carolina) and 11 other countries and which publishes the Journal of General Internal Medicine, is a leader in research and education in the care of adults. Many of SGIM's members have national expertise in research and teaching about alcoholism and other substance abuse. SGIM is deeply concerned that the *Whitner* decision will deprive addicted women in South Carolina of essential medical care – with grave consequences for the gestation, delivery and health of their offspring – by virtue of the chilling effect the decision will have on the ability and willingness of physicians to provide unfettered treatment to pregnant patients, and on the willingness of pregnant women to seek prenatal care and substance abuse services.

Amicus Curiae National Council on Alcoholism and Drug Dependence, Inc., ("NCADD"), with its nationwide network of affiliates, provides education, information, help and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. If NCADD affiliates were forced to provide the names of drug-using pregnant women to law enforcement authorities, it would greatly inhibit their ability to serve this population. In 1990, the NCADD Board of Directors adopted a policy statement

on "Women, Alcohol, Other Drugs and Pregnancy" that recommended that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services. . . . " For these reasons, NCADD opposes the *Whitner* decision below.

Amicus Curiae National Center for Youth Law ("NCYL"), founded in 1970, is a San Francisco-based nonprofit organization that works on legal and policy issues affecting poor children and youth nationwide. NCYL provides technical assistance and training, produces publications, and co-counsels major cases in the areas of health care, child welfare, public benefits, child support, and housing discrimination. NCYL has worked extensively on legal issues affecting drug-exposed infants, and in 1990 and 1995 published special issues of its journal, *Youth Law News*, on these topics. NCYL believes that the goal of child abuse reporting laws is to identify children who have been abused or neglected so that the state can intervene for their benefit. A system of mandatory child abuse reporting as envisioned by the *Whitner* decision not only has the potential for driving pregnant women away from prenatal care, but also risks wasting scarce child welfare resources and diverting attention from cases in which children who are at significant risk or have actually suffered abuse or neglect need assistance and protection.

Amicus Curiae Legal Services for Prisoners with Children ("LSPC") is a legal advocacy organization which has

represented incarcerated parents, their children and family members for over 20 years. LSPC staff have been lead counsel or co-counsel on four class action lawsuits which have successfully challenged seriously deficient medical care conditions for women prisoners, including pregnant, substance-dependent women incarcerated in California state prisons and county jails. The organization has represented many hundreds of pregnant women prisoners and pregnant, substance-dependent women who have been subjected to inadequate medical care during their pregnancies, leading in many cases to infant deaths, late-term miscarriages and serious pregnancy complications. LSPC staff have spoken nationally and written extensively on issues affecting pregnant women prisoners, urging policy reform which takes into account the actual consequences of subjecting pregnant, substance-dependent women to inadequate medical care while incarcerated.

Amicus Curiae Coalition on Addiction, Pregnancy and Parenting ("CAPP") is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-dependent women and their families throughout Massachusetts. CAPP is committed to establishing collaborative models of service delivery and fostering family-centered services. CAPP firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. CAPP members know firsthand the fears pregnant substance abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment,

thereby endangering the health and well-being of more women and children.

Amicus Curiae NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major focus of NOW LDEF's work is to oppose gender discrimination and promote reproductive health. Prosecuting women who give birth while addicted to alcohol or drugs hurts both women and children, for it will only deter women from seeking treatment for their addictions.

Amicus Curiae Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C., specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting women with alcohol and drug problems and their families, working to enact public policies which promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. This petition raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.

Amicus Curiae Women's Law Project is a non-profit legal advocacy organization in Pennsylvania. The Law

Project works to advance the legal and economic status of women and their families through public policy development, education, one-on-one counseling, and litigation. Throughout the past twenty-four years, the Law Project has played a leading role in the struggle to eliminate discrimination against women based on pregnancy and reproductive capacity. The Women's Law Project has represented *amici curiae* in a number of recent cases involving the improper application of state criminal child abuse and drug delivery statutes to pregnant women and new mothers who have given birth while suffering from an addiction to drugs or alcohol. The Women's Law Project believes that it is both unjust and counterproductive to impose criminal sanctions on pregnant women with untreated addictions.

Amicus Curiae Drug Policy Foundation is a privately funded, tax-exempt, non-profit organization which provides a forum for the development of effective drug policies. The Foundation was established in 1987 and is made up of thousands of individuals from a variety of professions involved with drug issues throughout the United States and around the world. Among the Foundation's advisory board members are individuals who have been leading officials in federal, state and local drug law enforcement agencies, as well as eminent researchers and physicians in the field of drug use. The Foundation is concerned that the *Whitner* decision below will do more harm than good by discouraging pregnant women from seeking prenatal care due to fear of prosecution. The resources spent on such counterproductive criminal law

efforts could be better spent on increasing access to prenatal care and drug treatment for pregnant addicted women.

Amicus Curiae Alliance for South Carolina's Children ("ASCC") is a private, nonprofit, statewide advocacy group whose mission is to build coalitions, develop programs, bring about community based solutions, and lead citizens to action on behalf of children independent of politics and bureaucratic agendas. Founded in 1992, the Alliance is committed to preventive programs and early interventions, which reduce suffering and save tax dollars. ASCC also works for solutions to problems, which strengthen the ability of families to respond to their own children's needs. If left to stand, the *Whitner* decision below will harm children and their families.